In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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** The pages of the transcript of the hearing carry the original transcript pagination, as well as numbers which reflect the placement of the transcript within the Appendix as a whole.

Relevant Docket Entries

No. 577-71 in the United States District Court
For the District of Columbia

Date	Filings—Proceedings
1971	
March 18	Complaint, together with plaintiffs application for convening of a Three-Judge District Court, filed
March 31	Order denying application for convening of Three-Judge District Court, filed
April 6	Plaintiffs' motion for reconsideration of order denying application for convening of Three-Judge District Court, filed
May 26	Order granting plaintiffs' motion for reconsideration, and granting application for convening of Three-Judge District Court, filed
June 21	Defendants' motion to dismiss, filed
July 21	Plaintiffs' opposition to defendants' motion to dismiss, filed
November 1	Three-Judge Court order denying motion to dismiss, filed
November 11	Defendant's answer to complaint, filed
1972	
February 18	Trial begun and concluded
July 31	Opinion and order granting injunction against enforcement and granting stay pending determination by the Supreme Court of the United States, filed
August 25	Notice of Appeal to the United States Supreme Court, filed

No. 72-634 in the United States Supreme Court

1972	
October 24	Jurisdictional Statement, filed

Date	
November 9	Motion to Affirm, filed
December 12	Order of Court Noting Probable Jurisdiction

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION

Plaintiffs, complaining of defendants, allege as follows:

JURISDICTION

1. This is an action for declaratory judgment and injunctive relief against the enforcement, operation and execution of an act of Congress for repugnance to the Constitution of the United States. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 2201, 2282 and 2284.

PARTIES

2. Plaintiff, National Association of Letter Carriers, AFL-CIO, is a union of approximately 200,000 postal employees with headquarters in Washington, D. C. Plaintiff's members are employed by the United States Post Office Department, an Executive Agency, in positions in the competitive civil service. (5 U.S.C. § 2102). Under the provisions of the Postal Reorganization Act of 1970 (Pub. L. No. 91-375) members of plaintiff union will become employees of the United States Postal Service, on July 1, 1971, as directed by the Board of Governors.

3. Plaintiff Democratic and Republican Committees are the official Democratic or Republican political organizations for their respective counties or District of Columbia. They are unincorporated associations with members elected by members of their parties resident in their respective counties or District of Columbia. Plaintiff Committees are organized and exist for the purpose of, and are engaged in, obtaining support for and promoting the candidacies of candidates of their parties for political office at all levels of government.

4. Plaintiff, John O. Hummel, is a resident of the Commonwealth of Virginia who is qualified and registered to

vote in primary and general elections for local, state and national office. He is employed as an executive officer in the Internal Revenue Service, an Executive agency, a position in the competitive civil service. (5 U.S.C. § 2102).

5. Plaintiff, Marie Pinho is a resident of the Commonwealth of Virginia who is qualified and registered to vote in primary and general elections for local, state and national office. She is employed as a Systems Analyst by the National Library of Medicine, an Executive agency, a position included in the competitive civil service.

6. Plaintiff, Ronald J. Wylie, is a resident of the State of Maryland who is qualified and registered to vote in primary and general elections for local, state and national office. He is employed as the Director, Political and Legal Analysis Branch, National Center for Health Services Research and Development of the Department of Health, Education and Welfare, an Executive agency, a position included in the competitive civil service.

7. Plaintiff, Frank Mandicino, Jr., is a member of plaintiff National Association of Letter Carriers, and is presently serving as an Assistant Regional Field Director. He is an employee of the Post Office Department in the competitive civil service.

8. Plaintiff, J. Price Gee, is a member of plaintiff National Association of Letter Carriers. He is employed by the Post Office Department as a letter carrier, a position in the competitive civil service.

9. Plaintiff, Charles O. Myers, is a member of plaintiff National Association of Letter Carriers. He is employed by the Post Office Department as a letter carrier, a position in the competitive civil service.

10. Defendant, United States Civil Service Commission, is composed of three Commissioners appointed by the President. Defendant Commission is charged with authority and responsibility for the administration of the competitive civil service. (5 U.S.C. §§ 1101-1302.)

11. Defendants, Hampton, Johnson and Andolsek, are the Commissioners of the United States Civil Service Commission. They are sued herein in their capacity. Defendant Hampton is Chairman of the United States Civil Service Commission. He is sued herein in that capacity.

12. Defendant Commissioners are charged with responsibility and authority for the enforcement of the "political

management" and "political campaigning" provisions of the Hatch Act, 5 U.S.C. §§ 1502(a)(3) and 7324(a)(2), to prevent political activities of covered state and local officers and employees and federal employees in the competitive civil service. In addition, Defendant Commissioners are charged with authority and responsibility to review removals of federal employees in the federal excepted service from their positions for political activities which violate the said provisions of the Hatch Act.

13. Defendant, Elliot L. Richardson, is Secretary of Health, Education and Welfare of the United States of America. He is sued herein in that capacity. All functions of the HEW are performed under his direction, authority and responsibility. As Secretary of HEW he possesses authority and responsibility for the enforcement of the provisions of the Hatch Act against persons employed temporarily by HEW on a "while actually employed" basis. 5 C.F.R. §§ 733.201-733.204.

Classes Represented

14. Plaintiff, National Association of Letter Carriers, AFL-CIO, sues on behalf of itself and in its capacity as a representative of its members. Plaintiff Democratic and Republican Committees sue on behalf of themselves and as representatives of all federal and state employees who are covered by the "political management" and "political campaigning" provisions of the Hatch Act, 5 U.S.C. §§ 1502(a)(3) and 7324(a)(2), and who presently desire, or will in the future desire, to engage in political activities in connection with or on behalf of Plaintiff Committees, which activities are or may be violations of said provision of the Hatch Act. Plaintiffs individually and collectively sue on behalf of themselves and as representatives of the class of all federal and state employees covered by said provisions of the Hatch Act and who presently desire or will in the future desire to engage in activities which are or may be in violation of said provisions.

15. The membership of each of the classes described is so numerous that joinder of all members of the class is impracticable; there are questions of law common to the members of each class; the claims or defenses of the representative parties are typical of the claims or defenses of the classes they represent, and the representative parties

will fairly and adequately protect the interests of the parties they represent. In addition, the prosecution of separate actions by individual members of any of the classes would create a risk of inconsistent or varying adjudications with respect to individual members of that class which would establish incompatible standards of conduct for the party opposing that class; and the party opposing each of the classes has acted on grounds generally applicable to each class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; and the questions of law common to the members of each of the classes predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

NATURE OF THE CONTROVERSY

16. This suit challenges the constitutional validity of those provisions of the Hatch Act which prohibit covered employees from taking "an active part in political management or in political campaigns." 5 U.S.C. §§ 1502(a)(3) and 7324(a)(2). Defendant Civil Service Commission has in the past enforced and threatened enforcement and continues to enforce and threaten enforcement of these political management and political campaigning provisions against employees of the United States Government in the competitive civil service and against covered state employees.

17. Such enforcement and threats of enforcement have been and continue to be directed against members of Plaintiff National Association of Letter Carriers who are presently covered by the Hatch Act and will continue to be covered after they become employees of the new Postal Service. In particular, the Commission has enforced or threatened enforcement and continues to enforce or threaten enforcement of these provisions of the Act with respect to the following types of activities which members of Plaintiff union have engaged in or presently desire to engage in:

a. Running in local elections for such offices as school board member, city council member or mayor.

b. Writing letters on political subjects to newspapers.

c. Participating as a delegate in a political convention and running for office in a political party.

d. Campaigning for candidates for political office.

18. Defendant Commission has additionally enforced or threatened enforcement and continues to enforce or threaten enforcement of the political management and political campaigning provisions of the Hatch Act against a wide range of political activities carried on by members of Plaintiff union in their capacities as officers or agents of Plaintiff union and its component local organizations. Such enforcement or threats of enforcement extend broadly to activities carried on by union members solely in a ministerial capacity. Such enforcement or threats of enforcement substantially hinder Plaintiff union in its efforts to fulfill its special responsibility to insure that governmental action affecting its membership is in their best interest and places Plaintiff union at a significant disadvantage in this regard when compared with other unions whose memberships are not restricted by the Hatch Act.

19. Plaintiff Democratic and Republican Committees have been and continue to be severely and adversely affected and disadvantaged by the enforcement and threats of enforcement of the political management and political campaigning provision of the Hatch Act against federal and state employees. In particular, Plaintiff Committees have been deterred and continue to be deterred from seeking desirable candidates who are Federal or state employees covered by the Hatch Act to run on the Democratic or Republican ticket for state and local offices. In addition, numerous individuals who would otherwise desire and be available to become members of Plaintiff Committees have been and continue to be deterred from doing so by said provisions of the Hatch Act. The general atmosphere of superstition and fear created by the political management and political campaigning provision of the Hatch Act has severely hindered Plaintiff Committees in their important responsibilities for fund raising and getting out the vote by deterring individuals from participating in political activities of any kind, including political donations and voting.

20. Plaintiff Hummel, an employee of an executive agency subject to the political management and political campaigning provisions of the Hatch Act, has desired in the past and continues to desire to engage in a wide variety of political activities prohibited him by these provisions, including (1) participation as a delegate in conventions of

a political party; (2) public endorsement of candidates of a political party for local, state and national office; (3) work at polling places on behalf of a political party during elections; (4) holding office in a political club. As a result of inquiries of the Civil Service Commission and his knowledge of the Hatch Act, Plaintiff Hummel is aware that such activities violate the Hatch Act. Solely because of fear of losing his job because of a violation of the Hatch Act, Plaintiff Hummel has refrained and continues to refrain from engaging in such activities.

21. Plaintiff Marie Pinho, as employee of an Executive agency subject to the political management and political campaigning provisions of the Hatch Act, presently desires to become a precinct Democratic Committee Woman in the Arlington County Democratic Committee. Solely because of her fear of losing her federal employment because of a violation of the Hatch Act, she has refrained from seeking this office and continues to refrain from doing so. Plaintiff Pinho desires to campaign for Democrat Harold O. Miller for United States Congressman from the Tenth District of Virginia and for Democrat William B. Spong for United States Senator from Virginia in the 1972 national elections, but is precluded from doing so solely because of fear that these activities will result in her loss of employment under the provisions of the Hatch Act.

22. Plaintiff Mandicino is now and was at all relevant times subject to the political management and political campaigning provisions of the Hatch Act. He has been and is active in the affairs of Plaintiff Union, including participation in the local AFL-CIO central body in Sioux City, Iowa. He is presently a member of the Executive Board of that body, and served as its President from 1965 to 1970. A primary purpose of the AFL-CIO central body is political action on behalf of union members, including campaigning and fund raising. As President of the AFL-CIO central body, Plaintiff Mandicino was compelled to engage in political activities prohibited by said provisions of the Hatch Act in order to carry out the responsibilities of his offices. He did engage in such activities including house-to-house campaigning for candidates of political parties, participation as a delegate in conventions of a political party, active participation in the affairs of a political party, and fund raising on behalf of political parties

and candidates. Plaintiff Mandicino has in the past and continues to be threatened with the possibility of the loss of his job because of such violations of the Hatch Act.

23. Plaintiff Ronald J. Wylie, on or about July 12, 1970, resigned from permanent employment as Director, Political and Legal Analysis Branch, National Center for Health Services Research and Development, Department of Health, Education and Welfare, a position in the competitive civil service, in order to run as a Republican candidate for the Maryland State Senate. Prior to his resignation, he had been a federal employee since 1963. During the period from or about July 11, 1970 until November 3, 1970, he was actively engaged campaigning as the Republican nominee for State Senator. During the same period, he was employed by the Department of HEW as a consultant on a part-time basis. He worked in this capacity on approximately thirty-five different days during the period. After he had been defeated in the November 3 election, Plaintiff Wylie sought to be reemployed by HEW on a permanent basis. In early December, 1970, he was informed by HEW personnel officer that, before he could be reemployed on a permanent basis, he would be required to sign a statement that, on the thirty-five days when he had served as a consultant, he did not engage in political management or political campaigning prohibited by the Hatch Act. Plaintiff Wylie refused to sign this statement. Directly and solely because of his refusal to sign such a statement, Plaintiff Wylie suffered a delay of approximately two and one-half months in securing reemployment on a permanent basis, which delay caused him loss of annual leave, sick leave, and retirement, health and life insurance benefits, and other monetary loss, and, in addition, severe mental anguish and suffering.

24. Plaintiff Gee is presently and has been at all relevant times subject to the political management and political campaigning provision of the Hatch Act. The election for office of Borough Councilman for his community, California, Pennsylvania, will be held in 1971; the primary is in May of 1971. The filing date for this office was March 9, 1971. The election for Councilman is a partisan election. Plaintiff Gee intended to and definitely would have filed for election to the office of Borough Councilman as an independent candidate had it not been for the Hatch Act. He did not file for election solely because of his fear that he would lose his job because of a violation of the Hatch Act. Plaintiff Gee pres-

ently continues to desire to run for election to the Council on a write-in basis, and definitely would do so were it not for his fear that he would lose his job because of a violation of the Hatch Act.

25. Plaintiff Myers is subject to the political management and political campaigning provisions of the Hatch Act. He presently desires to run as a Republican candidate in the 1971 partisan election for Mayor of West Lafayette, Indiana. The filing date for election is March 31, 1971, and the date of the primary is May 3, 1971. Plaintiff Myers was told by the Postmaster in Lafayette, Indiana that he would have to resign in order to run for election because of the Hatch Act. Plaintiff Myers definitely would file and run for the office of Mayor were it not for his fear that he would lose his job because of a violation of the Hatch Act.

26. The enforcement and threats of enforcement of the political management and political campaigning provisions of the Hatch Act by the defendants have exerted and continue to exert a chilling effect on the exercise of fundamental political freedoms by plaintiffs and those whom they represent.

27. The political management and political campaigning provisions of the Hatch Act, which defendants have enforced or threatened to enforce and continue to enforce or threaten to enforce against plaintiffs and members of the classes which they represent, are invalid and void under the Constitution of the United States for the following reasons:

a. Said provisions impinge on fundamental political rights of the plaintiffs in an overly broad manner and regulate conduct which is not subject to compelling governmental interest in violation of the rights of plaintiffs to freedom of speech, association, assembly, and petition under the First Amendment to the Constitution of the United States.

b. Said provisions regulate in an area of fundamental political rights in vague and imprecise terms in violation of the rights of plaintiffs to freedom of speech, association, assembly and petition under the First Amendment to the Constitution of the United States and in violation of the rights of plaintiffs to be free from deprivation of liberty without due process of law under the Fifth Amendment of the Constitution of the United States.

c. Said provisions effect invidious and unjustifiable discriminations between federal and state employees covered by the Act and governmental and private employees not covered by the Act in violation of the rights of plaintiffs to the equal protection of the laws under the Fifth Amendment to the Constitution of the United States.

28. Plaintiffs have no adequate remedy at law. Plaintiffs will suffer permanent and irreparable injury in the enjoyment of their Constitutionally-protected rights by the continued enforcement of the political management and political campaigning provisions of the Hatch Act.

RELIEF

WHEREFORE, Plaintiffs pray that:

1. A three-judge federal court be convened to hear and determine this case in accordance with the provisions of 28 U.S.C. 2282 and 2284.

2. This Court declare the provisions of law 5 U.S.C. 1502(a)(3) and 7324(a)(2) to be unconstitutional, invalid and void under the First and Fifth Amendments to the Constitution of the United States.

3. That each and all of the defendants be preliminarily and permanently enjoined from enforcing or executing or threatening enforcement of execution of the provisions of 5 U.S.C. 1502(a) and 7324(a)(2) against any and all of plaintiffs and the members of the classes which they represent.

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[Certificate of Service Omitted in Printing]

[Three-Judge Court]

POLITICAL ACTIVITY

of Federal Officers

and Employees

This pamphlet is a summary of laws and interpretations of laws which restrict political activity on the part of Federal employees and certain State and local employees. It is for persons who need a legal reference on this subject and is not intended to go beyond this basic purpose in content or distribution. Other Civil Service Commission issuances, which are more widely distributed, contain lists of permitted activities and urge employees to exercise their full rights as citizens. These issuances include Federal Employee Facts No. 2, "Political Activity—Rules for Federal Employees," and political activity posters, CSC Forms 1982 and 1982a.

U.S. CIVIL SERVICE COMMISSION

Pamphlet 20 • May 1966

Notice of Changes
in
Citations to Statutes

tember 6, 1966, the Hatch Political Activities Act and related laws evised and reenacted into a new title 5 of the United States Code.

ble below is for temporary reference in identifying former provisions law as they now appear in the new title 5. The revisions in 1966 t make any substantive changes in the law.

ch Act	Former Title 5	Title 5, United States Code, as revised
9(a) & (b)	118i	7324-25, 7327(a)
2	118k	1501-08 1/
4	118k-3	7324
5	1181	1501(5), 7324(a)(2)
6	118m	7327
8	118n	1503, 7326
1	118k-1	1501(4)(b), 7324(c)

.S.C. 1501-08 are the political activity provisions that apply to tain State and local employees.

lowing changes should also be noted:

: The following provision has been added to the Civil Service ions pertaining to the holding of State or local office by Federal es:

c. 734.204 Employees on leave without pay.
a) Subject to §734.205, a Federal employee who is on leave without pay may hold a State or local office on a full-time basis. The Federal employing agency is the sole judge of whether it is in its interest to grant leave without pay for the purpose of this paragraph.
b) An employee of a State or local government who is on leave without pay may hold a Federal position on a full-time basis under a temporary appointment."

The clause quoted under heading "Failure to Contribute or olitical Service not Prejudicial" now appears in the revised of the United States Code at section 7321.

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More information about legal principles governing political activity, including case descriptions, is contained in *Hatch Act Decisions of the United States Civil Service Commission*, on sale by the Superintendent of Documents, Government Printing Office, Washington 25, D.C., for $1.50 a copy.

I. General Prohibitions and Exceptions

The broadest and most widely applicable restrictions on political activity of Federal officers and employees are contained in section 4.1 of Civil Service Rule IV and in section 9 (a)[1] of the Hatch Act. In practically the same words, these provisions prohibit the following:

(1) Using official authority or influence for the purpose of interfering with an election or affecting its results.

(2) Taking an active part in political management or in political campaigns.

CIVIL SERVICE RULE IV

Section 4.1 of Civil Service Rule IV reads as follows:

Prohibition against political activity.—No person employed in the executive branch of the Federal Government, or any agency or department thereof, shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No person occupying a position in the competitive service shall take any active part in political management or in political campaigns, except as may be provided by or pursuant to statute. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

SECTION 9 OF THE HATCH ACT

Section 9 of the Hatch Act (Hatch Political Activities Act of August 2, 1939, as amended; 5 U. S. C. 118i) reads as follows:

(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws. The provisions of the second sentence of this subsection shall not apply to the employees of The Alaska Railroad, residing in municipalities on the line of the railroad, in respect to activities involving the municipality in which they reside.

(b) Any person violating the provisions of this section shall be removed immediately from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person: *Provided, however,* That the United States Civil Service Commission finds by unanimous vote that the violation does not warrant removal, a lesser penalty shall be imposed by direction of the Commission: *Provided further,* That in no case shall the penalty be less than thirty days' suspension without pay: *And provided further,* That in the case of any person who has heretofore been removed from the service under the provisions of this section, the Commission shall upon request of said person reopen and reconsider the record in such case. If it shall find by a unanimous vote that the acts committed were such as to

[1] The United States Supreme Court, in an opinion (330 U. S. 75), affirmed a judgment of the District Court of the United States for the District of Columbia holding that the provisions of section 9 (a) of the Hatch Act were not unconstitutional.

warrant a penalty of less than removal it shall issue an order revoking the restriction against reemployment in the position from which removed, or in any other position for which he may be qualified, but no such revocation shall become effective until at least ninety days have elapsed following the date of the removal of such person from office.

(c) At the end of each fiscal year the Commission shall report to the President for transmittal to the Congress the names, addresses, and nature of employment of all persons with respect to whom action has been taken by the Commission under the terms of this section, with a statement of the facts upon which action was taken, and the penalty imposed.

OTHER SECTIONS OF THE HATCH ACT

Sections 15, 16, 18, and 21 of the Hatch Act also relate to political activity of Federal officers and employees.

Section 15 (5 U. S. C. A., sec. 118–l) states that the provisions in the act containing prohibitions against "taking any active part in political management or in political campaigns" are deemed to include activities prohibited by the civil-service rules. It reads as follows:

The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

Sections 16, 18, and 21 set forth certain exceptions to the provisions prohibiting political activity.

Section 16 (5 U. S. C. A., sec. 118m) states an exception relating to political campaigns in localities adjacent to the National Capital or in localities where the majority of the voters are Government employees. It reads as follows:

Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or in political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.

Section 18 (5 U. S. C. A., 118n) states an exception relating to elections not specifically identified with National or State issues or political parties. It reads as follows:

Nothing in the second sentence of section 9 (a) or in the second sentence of section 12 (a) of this Act shall be construed to prevent or prohibit any person subject to the provisions of this Act from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection

with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party.

Section 21 (5 U. S. C. A., sec. 118k–l) states an exception relating to activities of employees of institutions and organizations of specified types. It reads as follows:

Nothing in sections 9 (a) or 9 (b), or 12 of this Act shall be deemed to prohibit or to make unlawful the doing of any act, by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization.

STATUTES ON RELATED SUBJECTS

In addition to being subject to section 4.1 of Civil Service Rule IV, and to the sections of the Hatch Act quoted above, Federal officers and employees are subject to statutes relating to—

(1) Political assessments (see p. 20 of this pamphlet).
(2) Political coercion (see p. 23).
(3) Political discrimination (see p. 24).
(4) Purchase and sale of public office (see p. 25).

INDIVIDUAL RESPONSIBILITY

Each officer and employee is responsible for refraining from prohibited political activity. He is presumed to be acquainted with the legal provisions applicable to him, and his ignorance of them will not excuse a violation. If he is in doubt as to whether any particular activity is prohibited, he should present the matter in writing to the United States Civil Service Commission before engaging in the activity.

II. Jurisdiction of the Commission

EMPLOYEES IN THE COMPETITIVE SERVICE

There is no language in the Hatch Act that fixes responsibility for enforcement of the prohibitions against political activity of Federal officers and employees.

However, it is important to note that the prohibitive language of section 9 (a) of the Hatch Act is substantially the same as that of section 4.1 of Civil Service Rule IV. The Civil Service Commission's jurisdiction in political-activity matters was not affected by passage of the Hatch Act.

Section 15 of the Hatch Act provides that the activities that are prohibited by the act are those that the Commission had theretofore determined were prohibited, under the civil-service rules, on the part of employees in the competitive civil service.

Thus, under Civil Service Rule IV *and* under the Hatch Act, the Civil Service Commission has authority to enforce prohibitions against political activity of Federal officers and employees whose positions are in the competitive civil service.

(*Excepted Service.*—The employing agency has the responsibility of enforcing the restrictions against political activity in the cases of those employees occupying positions specifically excepted from the provisions of the Civil Service Act and Rules.)

PENALTY PROVISIONS

The Attorney General has held (40 A. G. 14) that where both the law and the rule are violated the statutory penalty is mandatory.

An officer or employee found to have violated the restrictions imposed by section 9 (a) of the Hatch Act and section 4.1 of Civil Service Rule IV must be immediately removed from the position or office held by him and—in accordance with a decision by the Comptroller General (25 Comp. Gen. 271)—may not be employed again in any position the salary or compensation of which is payable under the same appropriation as the position from which removed. This restriction is not limited to the appropriation act for any particular fiscal year.

If, however, the Commission determines by unanimous vote that the violation does not warrant removal, it may impose a lesser penalty under the terms of the amendment to the Hatch Act of August 25, 1950, but the penalty so imposed must be at least a 30-day suspension.

In an opinion of the Attorney General of September 12, 1947 (40 A. G. 545) it was held that the penalty provisions of the Hatch Act require the removal of an employee from the civil-service position or office that he is holding at the time his violation of the act is established, despite the fact that this position may be different from that held at the time the violation occurred. It is immaterial whether the second civil-service position has been obtained by transfer, promotion, or reappointment.

AUTHORITY UNDER RULE V.

Section 5.4 (a) of Civil Service Rule V reads as follows:

Whenever the Commission finds that any person has been appointed to or is holding a position in violation of the Civil Service Act, Rules or Regulations, or that any officer or employee in the executive branch has violated this order or any of the laws, rules or regulations administered by the Commission, it is authorized, after giving due notice and opportunity for explanation to the officer or employee and the agency concerned, to certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal or other corrective actions.

Section 5.4 (c) of Civil Service Rule V reads as follows:

If the appointing officer fails to carry out the instructions of the Commission issued under Section 4 (a) of this Rule, the Commission shall certify the facts to the head of the agency concerned. If the head of the agency fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the Comptroller General of the United States, and shall furnish a copy of such certification to the head of the agency concerned; and thereafter no payment shall be made of the salary or wages accruing to the employee concerned.

The General Accounting Office is without jurisdiction to review the determinations of the Civil Service Commission under Rule V and, upon certification by the Commission that an employee is holding a position in violation of the Civil Service Act and rules, the General Accounting Office has no alternative to withholding credit for payments made for salary or compensation (decision, Comptroller General July 20, 1939, to the Postmaster General).

COMMISSION PROCEDURE

In taking action on alleged violations of section 4.1 of Civil Service Rule IV and section 9 of the Hatch Act, the Civil Service Commission proceeds under regulations that provide for—

(1) Investigation of the complaint by representatives of the Commission and the employing agency.

(2) Issuance of charges, when there is prima facie proof of prohibited political activity, with a description of the specific charges and an opportunity to respond in writing.

(3) Issuance of an initial decision by the General Counsel with the right of appeal to the Commissioners.

(4) A hearing, unless waived by the employee with the concurrence of the General Counsel.

The Commission's procedure applies in the cases of those employees who resigned from their positions prior to a final determination by the Commission.

The Commission's regulations also provide for the reconsideration of the record, as authorized by law, upon request, of employees who were removed between August 2, 1939, and August 25, 1950, for established political-activity violations, to determine whether the violations were such as to warrant a penalty of less than removal.

III. Applicability of Rule and Statute

GENERAL STATEMENT

In the absence of specific statutory exemption, the basic political-activity restrictions apply to any person employed in the executive branch of the Federal Government, or any agency or department thereof, or in the government of the District of Columbia. Some persons are subject to these restrictions by virtue both of section 4.1 of Civil Service Rule IV and of section 9 (a) of the Hatch Act; others are

subject to them solely by virtue of section 9 (a) of the Hatch Act.

Section 4.1 of Civil Service Rule IV applies to all employees in the competitive service.

Section 9 (a) of the Hatch Act applies to all persons employed in the executive branch of the Federal Government [1] whether or not such persons are in the competitive service. The effect of section 9 (a) of the statute is to place the same restrictions upon the political activities of all officers and employees of the executive branch of the Government that section 4.1 of Civil Service Rule IV places upon the political activities of officers and employees in the competitive service.

Section 14 of the Hatch Act (5 U.S.C. 118–k–3) provides: "For the purposes of this Act, persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States, except that for the purposes of the second sentence of Section 9(a) the Commissioners and the Recorder of Deeds of the District of Columbia shall not be deemed to be officers or employees."

GROUPS OF EMPLOYEES

Postmasters and Post-Office Employees

All postmasters and acting postmasters, all employees in post offices of the first, second, and third classes, and all special delivery messengers in post offices of the first class are subject to the political-activity restrictions of Civil Service Rule IV and section 9 of the Hatch Act.

Persons Employed on an Irregular or Occasional Basis

Persons who are employed on an irregular or occasional basis, e.g., experts and consultants on a per diem basis, w.o.c. and w.a.e. employees, etc., are subject to the political activity restrictions of the Hatch Act while in an active duty status only and for the entire 24 hours of any day of actual employment. The employing agency has the duty of enforcement in the cases of those employees occupying positions in the excepted service.

Temporary, Part-time, and Emergency Employees

Temporary, part-time, and emergency employees are subject to the statute and the rule.

Employees on Leave

An employee who is subject to the basic political-activity prohibitions while on active duty is subject to them while on leave with pay, leave without pay, or furlough, and incurs the same penalties for an offense committed while in leave or furlough status as for an offense committed while on active duty. However, if lump-sum payment is made for accumulated annual leave and the person involved is on terminal leave, he is not subject to the political-activity restrictions during the period covered by the lump-sum payment or thereafter.

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[1] Except (a) the President and Vice President of the United States; (b) persons whose compensation is paid from the appropriation for the office of the President; (c) heads and assistant heads of executive departments; and (d) officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

It is not permissible for an employee to take leave of absence for the purpose of working with a political candidate, committee, or organization, or for the purpose of becoming a candidate for office with the understanding that he will resign his position if nominated or elected.

Persons Not Subject to Political-Activity Restrictions

The political-activity restrictions of section 9 of the Hatch Act and section 4.1 of Civil Service Rule IV do not apply to the following persons:

EXECUTIVE BRANCH

The President and Vice President of the United States.

Persons who are compensated from the appropriation for the Office of the President.

Heads and assistant heads of departments.

Officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Ambassadors of the United States.

Ministers of the United States.

LEGISLATIVE BRANCH

Officers and employees of the legislative branch of the Federal Government, including secretaries and clerks of Members of Congress and congressional committees.

JUDICIAL BRANCH

Officers and employees of the judicial branch of the Federal Government, including United States Commissioners, clerks of United States courts, referees in bankruptcy, and their secretaries, deputies, and clerks.

DISTRICT OF COLUMBIA

The Commissioners of the District of Columbia.[1]

The Recorder of Deeds of the District of Columbia.[1]

OTHER

Officers or employees of any educational or research institution, establishment, agency, or system that is supported in whole or in part by any State or political subdivision, or the District of Columbia, or by any Territory or Territorial possession of the United States, or by any recognized religious, philanthropic, or cultural organization.

Persons who are retained from time to time to perform special services on a fee basis and who take no oath of office, fee attorneys, inspectors, appraisers, and management brokers for the Home Owners' Loan Corporation and special fee attorneys for the Reconstruction Finance Corporation.

Persons who receive benefit payments, such as old-age assistance and unemployment compensation under the Social Security Act, rural-rehabilitation grants, and payments under the agricultural conservation program.

Persons retired from the Federal service, unless reemployed in the executive branch of the Federal Government.

Persons serving as star route and contract carriers and clerks in fourth-class post offices, provided such persons are not at the same time holding other Government employment.

Employees of the Alaska Railroad residing in municipalities on the line of the railroad in respect to activities involving the municipality in which they reside.[1]

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[1] Excepted only from the prohibition against active participation in political management or in political campaigns.

IV. Prohibited Activities

The Hatch Act is designed to prevent those subject to it from assuming general political leadership or from becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office.

The following sections are devoted to a discussion of activities that, prior to enactment of section 15 of the Hatch Act (see p. 2), the Civil Service Commission had determined to be activities prohibited by the civil-service rules.

ACTIVITY BY INDIRECTION

Any political activity that is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are, therefore, accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

CONVENTIONS

Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance as a spectator is permissible, but the employee so attending may not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference.

PRIMARIES—CAUCUSES

An employee may attend a primary meeting, mass convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in its deliberations. He may not act as an officer of the meeting, convention, or caucus, may not address, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

MEETINGS

Service in preparing for, organizing or conducting a political meeting or rally, addressing such a meeting on any partisan political matter, or taking any part therein is prohibited.

COMMITTEES

The holding of the office of precinct committeeman, ward committeeman, etc., or service on or for any committee of a political party

organization is prohibited. An employee may attend any meeting of a political committee to which the general public is admitted but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether an employee may properly serve as a member. An employee may be assigned to duties that, considered alone, seem far removed from active politics; but those duties may assume an active political character when considered as part of the whole program. The Commission has held that service by an employee as chairman of a food committee at an occasion signifying the opening campaign speech of a nominee for Governor of a State is not permissible. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

CLUBS AND ORGANIZATIONS

Employees may be members of political clubs, but they may not be active in organizing such a club, be officers of the club or members or officers of any of its committees, or act as such, or address a political club on any partisan political matter. Service as a delegate or alternate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club and may vote on questions presented but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances.

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

> That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Active participation in the activities of a labor union by employees subject to the Hatch Act is not prohibited, where the organization is nonpartisan in character and has as its primary object improvements in the conditions of labor. Matters concerned solely with organization and management of a union of Federal employees are not political management or political activity in violation of section 9(a) of the Hatch Act, and adoption of a resolution limited to these matters would not violate the law. However, a Federal employee who engages in prohibited political activity under the direction or suggestion of a union local will be held personally accountable irrespective of whether he is acting as an individual or as a member of a group, including a union local.

Civil-service employees may hold office in organizations established for social betterment. It is pointed out, however, that in certain circumstances activities of such organizations may take on a character of partisan political activity. Employees who become members or officers of organizations of this type must take the responsibility for seeing that the activities in which they engage do not become partisan in character.

CIVIC ORGANIZATIONS AND CITIZENS' ASSOCIATIONS

Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, as amended, provided such activities have no connection with the campaigns of particular candidates or parties.

CONTRIBUTIONS

Employees may make voluntary contributions to a regularly constituted political organization for its general expenditures, subject to the limitation laid down in section 608, title 18, U. S. Code. The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

While employees may make contributions, they may not solicit, collect, receive, disburse, or otherwise handle contributions made for political purposes. Employees may not be concerned directly or indirectly in the sale of dinner tickets of a political party organization or in the distribution of pledge cards soliciting subscriptions to the dinners.

Voluntary contributions may be made at any time, so long as they are not made to another Federal officer or employee.

It is not permissible for a Federal administrative official to furnish the names of his personnel and their addresses for the purpose of political solicitation.

In addition, certain sections of the Criminal Code place restrictions on contributions by Federal employees. As stated above, contributions may not be handed over to another person in the Federal service; they may not be solicited in a Federal building by any person, whether or not in the Federal service; etc. For the text of these sections of the criminal code and further information on this matter, see part VIII, pages 19 through 25 These sections of the criminal code are within the jurisdiction of the Department of Justice, and the law provides severe penalties for violations.

EXPRESSION OF OPINIONS

Although the act reserves to employees affected the right to "express their opinions on all political subjects and candidates," this reservation is subject to the prohibition that employees may not take any active part in political management or in political campaigns.

Public expression of opinion in such a way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited.

BADGES, BUTTONS, PICTURES, AND STICKERS

Employees may not distribute campaign literature, badges, or buttons. They are not prohibited from wearing political badges or buttons or from displaying political posters or pictures in the windows of their homes or on their automobiles.

NEWSPAPERS—PUBLICATION OF LETTERS OR ARTICLES

An employee may not publish or be connected editorially or managerially with any newspaper generally known as partisan from a political standpoint, and may not write for publication or publish any letter or article, signed or unsigned, soliciting votes in favor of or against any political party, candidate, or faction. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use.

The Commission has held that as a general rule a newspaper that is considered as being partisan from a political standpoint, either during the campaign or in the interval between campaigns, is regarded as being subject to application of the restrictions against activity in connection therewith. It is not required that a publication be regarded as the organ of a political organization or that it have an official connection with any political organization or party. The words "editorially" and "managerially" are intended to apply to responsibilities and duties that have to do with the making of decisions affecting the editorial policies. The objective behind the restriction on activity in connection with such publications or newspapers is prohibition of political activity of a partisan character through the medium of the public press by a person subject to the statute and the rule.

Whether or not ownership of stock or membership on a board of directors of a corporation that publishes a daily newspaper is a violation of the political-activity restrictions will depend upon the degree to which the individual, by virtue of such ownership or membership, participates in controlling the editorial policy or news management of the publication. If a Federal employee makes decisions or assists in making decisions on editorial policy or news management with respect to the political status of the publication, a violation of the restrictions occurs, but mere ownership of stock would not of itself constitute a violation of the political-activity restrictions.

There is no direct prohibition against correspondence work by an employee for newspapers. The employee will have the responsibility, however, of ascertaining that any material he submits is not in contravention of the restrictions.

ACTIVITY AT THE POLLS AND FOR CANDIDATES

An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow

employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 18, sec. 597.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a National character. It is also a criminal offense to promise any employment, position, work, or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party.

An employee subject to the law must avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, helping to get out the voters on election days, acting as the accredited checker, watcher, or challenger of any party or faction, or any other partisan political activities at the polls. Rendering partisan political service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of prohibited political activities. This is not intended to prohibit one subject to the act from transporting members of his immediate family to and from the polls, in view of the community of interest that exists in such cases. The foregoing provisions do not apply if the election in question is covered by the exceptions embodied in section 18 of the law of August 2, 1939, as amended. (See p. 16.)

The publication or distribution of election campaign statements not containing names of persons responsible therefor is prohibited by law. The United States Code, title 18, section 612, reads as follows:

> Whoever wilfully publishes or distributes or causes to be published or distributed, or for the purpose of publishing or distributing the same, knowingly deposits for mailing or delivery or causes to be deposited for mailing or delivery, or, except in cases of employees of the Post Office Department in the official discharge of their duties, knowingly transports or causes to be transported in interstate commerce any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning any person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to Congress, in a primary, general, or special election, or convention of a political party, or has caused or permitted his intention to do so to be publicly declared, which does not contain the names of the persons, associations, committees, or corporations responsible for the publication or distribution of the same, and the names of the officers of each such association, committee, or corporation, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

ELECTION OFFICERS

A Federal employee may serve as an election officer provided that in so doing he discharges the duties of the office in an impartial manner

as prescribed by State or local law, except that he may not become a candidate for such office in a partisan election.

PARADES

An employee may not participate in or help organize a political parade. An employee may be a member of a band or orchestra that takes part in parades or rallies provided such band or orchestra is generally available for hire as a musical organization.

PETITIONS

The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any Committee or Member thereof, shall not be denied or interfered with."

An employee subject to the law of August 2, 1939, as amended (the Hatch Act), is permitted to sign a nominating petition in behalf of a partisan candidate. He may not initiate such petitions or canvass for the signatures of others.

CANDIDACY FOR PUBLIC OFFICE

Candidacy for nomination or for election to a National, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy. An employee may not solicit others to become candidates for nomination or for election to such an office.[1]

The Attorney General held in an opinion to the Secretary of the Interior dated April 17, 1940 (39 Op. Atty. Gen. 423), that the Hatch Act does not apply to the acceptance and holding of a local office to which an employee was elected without being a candidate, his name not appearing on the ballot but being written in by voters. However, the Commission interprets this opinion as applicable only in cases where the writing in of an employee's name is a spontaneous action on the part of the voters and does not come about as a result of prearrangement whereby the employee was in effect a candidate before the vote was cast.

This decision is authority for the statement that the mere holding of a public office is not in itself a violation. (See also Attorney General's Circular No. 3301, October 26, 1939.)

[1] For exceptions, see "V. Exceptions to Hatch Act Restrictions," pp. 16-18.

However, it should be noted that membership on a political committee is not a public office, within the meaning of the foregoing, even though held by election as a political representative of a ward, precinct, county, or of the voting subdivision of a State. The holding of such political offices is prohibited.

V. Exceptions to Hatch Act Restrictions

The Hatch Act specified two conditions under which political activity on the part of Federal officers and employees is permissible.

(1) Section 18 of the act sets forth an exception relating to elections not specifically identified with National or State issues or political parties.

(2) Section 16 of the act sets forth an exception relating to political campaigns in communities adjacent to the District of Columbia or in communities the majority of whose voters are employees of the Federal Government.

Both sections are quoted on page 4 of this pamphlet.

SECTION 18

To be permissible under section 18, the activity must be of a strictly local character—completely unrelated to issues and candidates that are identified with National and State political parties.

SECTION 16

For many years prior to enactment of the Hatch Act, Federal employees residing in certain municipalities near the District of Columbia were permitted to be candidates for, and to hold, local office in those municipalities.

The permission was granted either by an individual Executive order or by action of the Commission based on an Executive order, and it remained in full force and effect until the passage of the act of August 2, 1939, which prohibited active participation in political management or in political campaigns, without exception. When this act was amended by the act of July 19, 1940, a new section was added (section 16, 54 Stat. 767) whereby the Commission was authorized to promulgate regulations extending the privilege of active participation in local political management and local political campaigns to Federal employees residing in any municipalities or other political subdivisions of the States of Maryland and Virginia in the immediate vicinity of the District of Columbia or in municipalities the majority of whose voters are employed by the Government of the United States.

The Commission has promulgated regulations governing the extension of the privileges set forth in the section quoted above and copies of these regulations are available upon request to the Commission's central office in Washington, D. C. Under these regulations it is necessary that a formal request be received from the representatives of the community involved and that the petitioners furnish certain specified information relative to their community and its elections. In all cases

the final decision as to the extension of the privileges of section 16 to any individual municipality depends on the municipality's meeting certain prerequisites that are set forth in the Commission's regulations.

The Commission has extended the privileges allowed by section 16 of the Hatch Act to the following municipalities or political subdivisions by formal action recorded on the dates indicated:

In Maryland

Annapolis (May 16, 1941).
Berwyn Heights (June 15, 1944).
Bethesda (Feb. 17, 1943).
Bladensburg (Apr. 20, 1942).
Bowie (Apr. 11, 1952).
Brentwood (Sept. 26, 1940).
Capitol Heights (Nov. 12, 1940).
Cheverly (Dec. 18, 1940).
Chevy Chase, sections 1 and 2 (Mar. 4, 1941).
Chevy Chase, section 3 (Oct. 8, 1940).
Chevy Chase, section 4 (Oct. 2, 1940).
Martin's Additions 1, 2, 3, and 4 to Chevy Chase (Feb. 13, 1941).
Chevy Chase View (Feb. 26, 1941).
College Park (June 13, 1945).
Cottage City (Jan. 15, 1941).
District Heights (Nov. 2, 1940).
Edmonston (Oct. 24, 1940).
Fairmont Heights (Oct. 24, 1940).
Forest Heights (Apr. 22, 1949).
Garrett Park (Oct. 2, 1940).
Glenarden (May 21, 1941).
Glen Echo (Oct. 22, 1940).
Greenbelt (Oct. 4, 1940).
Hyattsville (Sept. 20, 1940).
Kensington (Nov. 8, 1940).
Landover Hills (May 5, 1945).
Montgomery County (Apr. 30, 1964).
Morningside (May 19, 1949).
Mount Rainier (Nov. 22, 1940).
North Beach (Sept. 20, 1940).
North Brentwood (May 6, 1941).
North Chevy Chase (July 22, 1942).
Northwest Park (Feb. 17, 1943).
Prince Georges County (June 19, 1962).
Riverdale (Sept. 26, 1940).
Rockville (Apr. 15, 1948).
Seat Pleasant (Aug. 31, 1942).
Somerset (Nov. 22, 1940).
Takoma Park (Oct. 22, 1940).
University Park (Jan. 18, 1941).
Washington Grove (Apr. 5, 1941).

In Virginia

Alexandria (Apr. 15, 1941).
Arlington County (Sept. 9, 1940).
Clifton (July 14, 1941).
Fairfax County (Nov. 10, 1949).
Town of Fairfax (Feb. 9, 1954).
Falls Church (June 6, 1941).
Herndon (Apr. 7, 1945).
Vienna (Mar. 18, 1946).
Portsmouth (Feb. 27, 1958).

Other Municipalities

Bremerton, Wash. (Feb. 27, 1946).
Port Orchard, Wash. (Feb. 27, 1946).
Elmer City, Wash. (Oct. 28, 1947).
Anchorage, Alaska (Dec. 29, 1947).
Benicia, Calif. (Feb. 20, 1948).
Warner Robins, Ga. (Mar. 19, 1948).
Sierra Vista, Ariz. (Oct. 5, 1955).
New Johnsonville, Tenn. (Apr. 26, 1956).
Huachuca City, Ariz. (Apr. 9, 1959).

The Commission's actions extending the privileges of active participation in local self-government of the above-listed communities to resident Federal officers and employees are subject to the following restrictions:

(1) Federal officers and employees in the exercise of these privileges must not neglect their official duties and must not engage in nonlocal partisan political activities.

(2) Federal officers and employees must not run for local office as candidates representing a political party or become involved in political management in connection with the campaign of a party candidate for office.

(3) Federal officers and employees who are candidates for local elective office must run as independent candidates.

(4) Federal officers and employees elected or appointed to local offices requiring full-time service must resign their positions with the Federal Government. If elected or appointed to offices requiring only part-time service they may accept and hold the same without relinquishing their Federal employment provided the holding of such part-time office does not conflict or interfere with their duties as officers or employees of the Federal Government. The department or independent agency in which Federal officers or employees are employed is the sole judge of whether or not the holding of the local office conflicts or interferes with their official duties as officers or employees of the Federal Government.

(5) The permission granted by the Commission to any particular community may be suspended or withdrawn by the Commission when in its opinion the activities resulting therefrom are or may become detrimental to the public interest or inimical to the proper enforcement of the political-activity law and rules.

VI. State Officers and Employees

This publication deals primarily with the political-activity restrictions applicable to Federal officers and employees. However, it should be mentioned that there are other provisions of the so-called Hatch Act that apply Federal political-activity restrictions to those officers and employees of a State, or local agency of a State, whose principal employment is in connection with an activity financed in whole or in part by Federal loans or grants. These restrictions are also enforceable by the United States Civil Service Commission. The following rule of jurisdiction has been adopted by the Commission in these cases:

> An officer or employee of a State or local agency is subject to the Act if, as a normal and foreseeable incident to his principal job or position, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not.

The restrictions applicable to State or local agency officers and employees falling within the scope of this rule of jurisdiction prohibit the following:

(1) Use of official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof.

(2) Directly or indirectly coercing, attempting to coerce, commanding, or advising any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes.

(3) Active participation in political management or in political campaigns.

The first two restrictions are self-explanatory and the third covers the same activities that are described in part IV of this pamphlet.

VII. Federal Officers and Employees Holding State or Local Office by Appointment

By virtue of the provisions of the Act of October 31, 1951 (3 U.S.C. 301, 302), Executive Order No. 10530, as amended, and Rev. Stat. sec. 1753 (5 U.S.C. 631) the Commission on December 21, 1956, issued the following general regulation applicable to officers and employees in all departments and agencies:

Full-time Federal employees may hold positions under a State or local government on other than a full-time basis; and

Federal employees employed on other than a full-time basis may hold positions under a State or local government, whether full-time or otherwise; provided that the Federal agency determines in advance that the holding of the State or local office will not interfere with the regular and efficient discharge of an employee's Federal duties. (21 F. R. 10365.)

VIII. Criminal Law Violations and Related Subjects

In addition to being restricted by the act of August 2, 1939 (as amended), civil-service rules, Executive orders, and departmental regulations, the freedom of officers and employees of the executive civil service to engage in politics is limited by a number of statutes. These statutes are generally applicable to all officers and employees of the United States, whether or not in the competitive service, and, in some cases, the language of the statute is sufficiently broad to include any person receiving compensation for services from money derived from the Treasury of the United States, and other persons. These statutes are set forth in the following sections. Some of the activities prohibited under penalty of fine and imprisonment are:

(1) Solicitation or receipt of political contributions by one officer or employee from another.

(2) The giving or handing over of a political contribution by one employee to another.

(3) Solicitation or receipt of political contributions in a Federal building by any person, whether or not an employee of the Government.

(4) Solicitation or receipt by any person of political contributions from any person receiving any benefit under any act of Congress appropriating funds for relief.

(5) Solicitation or receipt of any thing of value, either for personal reward or as a political contribution, in return for the promise to use, or the use of, influence to secure an appointive office under the United States.

(6) Payment or the offer of payment for the use of influence in securing appointive office under the United States.

(7) Promising employment, compensation, or other benefit made possible by act of Congress as consideration or reward for political activity.

(8) Discrimination by an officer or employee in favor of, or against, another officer or employee on account of political contributions.

(9) Depriving any person on account of race, creed, color, or political activity, of compensation or other benefit made possible by any act of Congress appropriating funds for relief.

(10) Disclosure for political purposes of any list or names of persons receiving benefits under an act of Congress appropriating funds for relief and the receipt of such a list or names for political purposes.

POLITICAL ASSESSMENTS

Solicitation of Political Contributions

The United States Code, title 18, section 602, reads as follows:

Whoever, being a Senator or Representative in, or Delegate or Resident Commissioner to, or a candidate for Congress, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, directly or indirectly solicits, receives, or is in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever from any other such officer, employee, or person, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Solicitation From Benefit Recipients

The United States Code, title 18, section 604, reads as follows:

Whoever solicits or receives or is in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose from any person known by him to be entitled to, or receiving compensation, employment, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Furnishing List of Benefit Recipients

The United States Code, title 18, section 605, reads as follows:

Whoever, for political purposes, furnishes or discloses any list or names of persons receiving compensation, employment or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee or campaign manager; and

Whoever receives any such list or names for political purposes—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Circulars of Solicitation Bearing Names of Federal Employees

In an opinion of October 17, 1902 (24 Op. 133), the Attorney General held that the sending of a circular letter by a political committee to Federal officers and employees soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service Act (now sec. 602, title 18, of the U. S. Code), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for

any political purpose whatever from any officer or employee of the United States. The statute unquestionably condemns all such circulars, notwithstanding the particular form of words adopted, in order to show a request rather than a demand, and to give the responses a quasi-voluntary character.

"Political Assessments" Defined

The following is an extract from the decision in *United States* v. *Scott* (74 Fed. 213), in the Circuit Court of the District of Kentucky, rendered October 7, 1895, by Taft, J.:

To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution. * * * Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States.

The following extract is from the decision rendered by McCall, J., in the case of *United States* v. *Dutro*, *L. W.*, 1913, Western District of Tennessee (unreported):

The statute under which the indictment was found prohibits (and I shall speak of this concrete case) the postmaster at Memphis, Tenn., from receiving, or being in any manner concerned in receiving, any assessment, subscription, or contribution for any political purpose whatever from any official, clerk, or employee of the United States.

There are four counts in the indictment. Two of them charge the defendant with receiving subscriptions and contributions for political purposes from an officer, clerk, or employee of the United States, and two of them charge defendant with being concerned in receiving such assessment or subscription for political purposes from a clerk or employee of the United States.

Evidently one of the purposes of Congress in enacting the legislation was to prohibit superior officers from bringing pressure to bear upon their subordinates in order to secure contributions for campaign purposes, and the act is couched in very broad terms.

This evidence (which so far is uncontradicted) shows that the defendant, Mr. Dutro, did receive two contributions for campaign purposes from an officer or clerk or employee of the United States. Whatever may have been Mr. Dutro's frame of mind in regard to his connection with it, the one fact remains, as the evidence shows, that he received these contributions for the purposes and from the parties which the law prohibits. Perhaps and no doubt he did so without any thought that he was violating any statute, and felt that he was acting purely as a conveyor of these contributions to the political parties for whom they were intended, to accommodate those who were making the contributions, and purely as a personal matter, but I think under the evidence his action was in violation of the statute.

The other two counts, as I have pointed out, charge the defendant with being concerned in receiving assessments, subscriptions, or contributions for campaign purposes from a clerk, employee, or officer of the United States. There is a controversy here between counsel as to what the word "concerned" means. From what the law books say which have been read here, and from my own impression, it seems that the word "concerned" means to be interested in, or take part in, receiving such contributions. If Mr. Dutro, by his connection with these two subscriptions, took a part in the contributions being made by employees of the Government for campaign purposes, he would be guilty. I think the natural construction of the phrase or term or word necessarily leads to the conclusion that he did take a part in

receiving the contributions, because he received and conveyed them from the contributors to the parties for whom they were intended, and, as the proof so far shows, he knew that the parties who were making the contributions were clerks under him in the Post Office Department, and he knew the purpose for which the money was to be used and where it was to go.

The foregoing case definitely establishes the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of the statute.

Solicitation or Receipt of Political Contributions in Federal Buildings

The United States Code, title 18, section 603, reads as follows:

Whoever, in any room or building occupied in the discharge of official duties by any person mentioned in section 602 of this title, or in any navy yard, fort, or arsenal, solicits or receives any contribution of money or other thing of value for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Letters Addressed to Federal Buildings

The Commission by a minute of March 23, 1897, held that addressing a letter to a Government employee in a Government building soliciting political contributions is a solicitation in that building, but notwithstanding numerous violations no opportunity arose of having the question judicially determined until 1907, when an indictment was obtained against Edward S. Thayer at Dallas, Tex. A demurrer to the indictment was sustained on the ground that the act required the personal presence in the Government building of the solicitor. Appeal was taken to the Supreme Court, and the judgment of the lower court was reversed. (*United States* v. *Thayer*, 209 U. S. 39.) The opinion of the Court, delivered by Justice Holmes on March 9, 1908, establishes definitely the proposition that solicitation by letter or circular addressed to and delivered by mail or otherwise to an officer or employee of the United States at the office or building in which he is employed in the discharge of his official duties is a solicitation "in a room or building" within the meaning of this section, the solicitation taking place where the letter was received. (See also *United States* v. *Smith*, 163 Fed., 926, where the letter was personally delivered.)

Letters Delivered in Federal Buildings

The act of sending through the mails letters to Government employees soliciting political contributions, their street or home address being omitted from the envelopes, with the result that the letters are delivered by the postal authorities in the Government building in which they are employed, may constitute a violation of section 603 of title 18 of the United States Code. It is a maxim of law that a person is presumed to intend the natural and probable consequences of his acts, and failure or omission to take measures to avoid delivery of such letters in a Government building will render the offender liable to prosecution.

Discrimination on Account of Political Contributions

The United States Code, title 18, section 606, reads as follows:

Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Payment of Political Contributions by One Employee to Another

The United States Code, title 18, section 607, reads as follows:

Whoever, being an officer, clerk, or other person in the service of the United States or any department or agency thereof, directly or indirectly gives or hands over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

POLITICAL COERCION

Section 2, clause second, of the Civil Service Act directs that the civil-service rules "shall provide and declare as nearly as the conditions of good administration will warrant, as follows: * * * Sixth. That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." In pursuance of this section, Civil Service Rule IV, section 4.1, provides, in part, that "Persons in the executive branch * * * shall not use their official authority or influence for the purpose of interfering with an election or affecting the result thereof." This provision applies to all persons in the executive civil service, and is held to prohibit a superior officer from requesting or requiring the rendition of any political service or the performance of political work of any sort by subordinates.

Intimidation and Coercion of Voters in Elections of Certain Officers

The United States Code, title 18, section 594, reads as follows:

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and Possessions, at any election held solely or in part for the purpose of electing such candidate, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Administrative Employees of United States or Any State—Use of Official Authority To Influence Elections

The United States Code, title 18, section 595, reads as follows:

Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia, or by any agency or instrumentality thereof, or by any State, Territory, or Possession

of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or Possession, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Possession of the United States; or by any recognized religious, philanthropic, or cultural organization.

Use of Official Authority in Coercing Voters

The United States Code, title 18, section 598, reads as follows:

Whoever uses any part of any appropriation made by Congress for work relief, relief, or for increasing employment by providing loans and grants for public-works projects, or exercises or administers any authority conferred by any Appropriation Act for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

POLITICAL DISCRIMINATION

Failure To Contribute or Render Political Service Not Prejudicial

Section 2, clause second, of the Civil Service Act reads as follows:

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Deprivation of Employment, Compensation, or Other Benefit

The United States Code, title 18, section 601, reads as follows:

Whoever, except as required by law, directly or indirectly, deprives, attempts to deprive, or threatens to deprive any person of any employment, position, work, compensation, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Prohibition Against Racial, Political, or Religious Discrimination

Section 4.2 of Civil Service Rule IV reads as follows:

No person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is an employee in the competitive service or any eligible or applicant for a position in the competitive service shall make any inquiry concerning the race, political affiliation or religious beliefs of any such employee, eligible, or applicant. All disclosures concerning such matters shall be ignored, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be

exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation or religious beliefs, except as may be authorized or required by law.

PURCHASE AND SALE OF PUBLIC OFFICE

Offer To Procure Appointive Public Office

The United States Code, title 18, section 210, reads as follows:

Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Acceptance or Solicitation To Obtain Appointive Public Office

The United States Code, title 18, section 211, reads as follows:

Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Whoever solicits or receives anything of value in consideration of aiding a person to obtain employment under the United States either by referring his name to an executive department or agency of the United States or by requiring the payment of a fee because such person has secured such employment shall be fined not more than $1,000, or imprisoned not more than one year, or both. This section shall not apply to such services rendered by an employment agency pursuant to the written request of an executive department or agency of the United States.

Promise of Employment, Compensation, or Other Benefit

The United States Code, title 18, section 600, reads as follows:

Whoever, directly, or indirectly, promises any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any Act of Congress, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Title and Addressees Omitted in Printing]

PLAINTIFF'S INTERROGATORIES TO DEFENDANT CIVIL SERVICE COMMISSION (SET NO. 1)

The Plaintiff's request that the defendant Civil Service Commission answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1.0. Unless otherwise specified or obvious from the context, as used throughout these interrogatories, the word "act" or "acts" has the same meaning as the word "acts" in 5 U.S.C. § 7324(a)(2). As used herein "statute" refers to 5 U.S.C. §§ 1502(a)(3) and 7324(a)(2).

1.1. List with specificity each and every act of political management or campaigning which was prohibited "on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

1.2. Is each act listed in response to question 1.1 prohibited by the statute as presently interpreted by the Civil Service Commission?

1.2.1. If the answer to question 1.2 is "no", then specify which of the listed acts are no longer deemed prohibited?

1.2.2. Under what authority did the Commission determine that these acts were permissible after having determined them impermissible prior to July 19, 1940?

1.3 Is it the position of the Civil Service Commission that the statute requires that each and every act listed in response to question 1.1 be prohibited?

1.3.1. If the answer to question 1.3 is "no", then which of these acts are permissible under the current view of the Commission?

1.3.2. Are there presently certain circumstances which lead the Commission to this judgment, which circumstances did not obtain when said acts were initially prohibited?

1.3.3. If so, what are these circumstances and why do they compel a reversal of the Commission's original judgment?

2.0. As used in questions 2.1 through 2.9.7, the word

"determination" or "determinations" has the same meaning as the word "determinations" in 5 U.S.C. §§ 7324(a)(2) and 1501(5). As used in questions 2.1 through 2.9.7, the word "rule" or "rules" refers to the "rules prescribed by The President" referred to in 5 U.S.C. § 7324(a)(2).

2.1. How many "determinations" did the Commission make under the rules prescribed by The President prior to July 19, 1940?

2.1.2. What was the date of the first such determination?

2.2. List with specificity each and every such "determination", giving a description sufficient for use in a subpoena.

2.3. What, if any, indexing system is available to the Commission and its staff in referencing these "determinations"?

2.4. How are these "determinations" made available to the general public?

2.5. How are these "determinations" made available to employees within the ambit of 5 U.S.C. § 7324 or 5 U.S.C. § 1502?

2.6. When an employee (as defined in 2.5) asks the Commission for advice as to whether a specific act is prohibited or permitted under the Act, does the Commission render an opinion?

2.6.1. Is it the Commission's general policy to include a citation to a particular determination or determinations in such opinions?

2.6.2. Has any such opinion ever specifically referred to a "determination?"

2.6.3. If not, does the Commission, as a matter of internal policy, have any routine method of relating each such opinion to a determination?

2.6.4. If not, upon what basis are the opinions written?

2.7. In the following cases, the Commission indicated that it had searched the pre-July 19, 1940 "determinations" but finding none sufficiently in point rendered in each case decisions favorable to the respondents: *John N. Cawley*, Dkt. No. 1247, (Dec. 29, 1949); *Herbert S. Reed*, Dkt. No. 1204 (Aug. 4, 1947); and *Nell W. Floyd*, Dkt. 1149 (Feb. 7, 1947). Were these determinations based upon a view of the Commission that only specific activities which were determined prior to July 19, 1940 to be prohibited "active par-

ticipation in political management or political campaigns" can be so determined after July 19, 1940?

2.7.1. If so is this the Commission's view today?

2.7.2. State all the pertinent facts in each of the foregoing determinations, or, in the alternative, furnish a copy of each determination.

2.8. Is the decision of the Commission in *Archie B. Cole*, File No. 47-3057 (June 8, 1932) a binding determination within the meaning of the Act?

2.8.1. What specific act or acts does that determination prohibit?

2.8.2. Does the Commission today deem those specific acts to be prohibited by the statute?

2.8.3. If the answer to question 2.8 is "no", then by what procedure was the case referred to in question 2.8 overruled?

2.8.4. Does the Commission contend that participating in meetings of the Watch Tower Bible and Tract Society is an act prohibited by the statute?

2.8.5. Does the Commission contend that circulation of literature devoted, in large part, to vigorous criticism of our Governments, statesmen, financiers, etc., as well as other Governments, and the Churches and Clergy in general is an act prohibited by the statute?

2.8.6. If "no" to 2.8.4 and 2.8.5 was not the *Cole* determination referred to in question 2.8 enacted into law by the statute?

2.9. How many determinations has the Civil Service Commission made after July 19, 1940, pursuant to 5 U.S.C. § 7324(a)(2), to the effect that a given act was an "impermissibly 'active part in political management or political campaigning'?"

2.9.1. List with specificity each and every such "determination" giving a description sufficient for use in a subpoena.

2.9.2. Do the "determinations" referred to in question 2.9 prohibit any acts not prohibited by the "determinations" referred to in question 2.1?

2.9.3. If so, list with specificity each and every such act.

2.9.4. If so, upon what authority were such acts prohibited?

2.9.5. With respect to the "determinations" referred to in question 2.9, what, if any, indexing system is available

to the Commission and its staff in referencing these "determinations?"

2.9.6. How are these "determinations" made available to the general public?

2.9.7. How are these "determinations" made available to employees (as defined in question 2.5)?

3.0 5 C.F.R. 733.122 specifically designates thirteen (13) activities as prohibited acts of political management or campaigning. The regulation also points out that the activities prohibited "are not limited to" those listed in the regulation. As used herein the word "regulation" shall refer to 5 C.F.R. 733.122.

3.1. Pursuant to what authority has the Commission promulgated the regulation?

3.2. List with specificity each and every act that is prohibited by the statute but which is not included in subsection (b)(1) through (b)(13) of the regulation?

3.3. Is the application of paragraph (a) of the regulation limited by the determinations of the Commission prior to July 19, 1940 as referred to in question 2.2?

3.3.1. Is the application of paragraph (a) of the regulation limited to the acts of political management or campaigning listed in response to question 1.1?

3.3.2. Is the application of paragraph (a) of the regulation limited to the acts of political management or campaigning specifically prohibited in Civil Service *Pamphlet 20* of 1966?

3.4. How can an employee (as defined in question 2.5) determine which activities, other than those specifically enumerated in the regulation, are prohibited by the regulation?

3.5. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found serving as an officer of a political party to be an impermissibly "active part in political management or in political campaigns."

3.5.1. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found serving as a member of a national, state or local committee of a political party to be an impermissibly "active part in political management or in political campaigns."

3.6. Identify by case name, file number and docket num-

ber, any and all pre-July 19, 1940 "determinations" of the Commission which found being an officer or a member of a committee or a member of a partisan political club to be an impermissibly "active part in political management or in political campaigns."

3.7. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found organizing or reorganizing a political party, organization or political club to be an impermissibly "active part in political management or in political campaigns."

3.8. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found directly or indirectly soliciting, receiving, collecting, handling, disbursing or accounting for assessments, contributions or other funds for partisan political purpose to be an impermissibly "active part in political management or in political campaigns."

3.9. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party or political club to be an impermissibly "active part in political management or in political campaigns."

3.10. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found taking an active part in managing the political campaign of a partisan candidate for public office or political party office to be an impermissibly "active part in political management or in political campaigns."

3.11. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found soliciting votes in support of or in opposition to a partisan candidate for political office or political party office to be an impermissibly "active part in political management or in political campaigns."

3.12. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found acting as recorder, watcher, challenger or similar officer at the polls on behalf of a political party or partisan candidate to be an impermissibly "active part in political management or in political campaigns."

3.13. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found driving voters to the polls on behalf of a political party or partisan candidate to be an impermissibly "active part in political management or in political campaigns."

3.14. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, broadcast, campaign literature or similar material to be an impermissibly "active part in political management or in political campaigns."

3.15. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found serving as a delegate, alternate or proxy to a political party convention to be an impermissibly "active part in political management or in political campaigns."

3.16. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found addressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a partisan candidate for political or public office or political party office to be an impermissibly "active part in political management or in political campaigns."

3.17. Identify by case name, file number and docket number, any and all pre-July 19, 1940 "determinations" by the Commission which found initiating or circulating a partisan nominating petition to be an impermissibly "active part in political management or in political campaigns."

4.0. As used herein, and unless otherwise noted, "Pamphlet 20" refers to a pamphlet by the Civil Service Commission, numbered "20", dated May 1966, and titled "Political Activity of Federal Officers and Employees."

4.1. Does Pamphlet 20 reflect the current view of the Commission as to its interpretation of the statute?

4.1.2. If "yes", is it correct to assume that, since Pamphlet 20 was promulgated in May, 1966, the Commission's interpretation of the statute remains unaltered since May 1966?

4.1.3. If the answer to question 4.1 is "no" then what is

the current view of the Commission as to the force and effect of Pamphlet 20?

4.2. List with specificity each and every "determination" (as the term is employed both in questions 2.9 and 2.1) of the Commission reflected in the 1959 Edition of Pamphlet 20 and not reflected in the 1966 Edition.

4.2.1. Why were these determinations excluded from the 1966 Edition?

4.3. List with specificity all determinations (as the term is employed in question 2.9) of the Commission subsequent to the 1959 Edition of Pamphlet 20 which are reflected in the 1966 Edition of Pamphlet 20.

4.3.1. If the editions referred to in question 4.2. differ as to any activity which is prohibited in one yet permitted in the other, by what authority was such a change (or changes) effected?

4.4. List all editions of Pamphlet 20 which have been promulgated by the Commission.

4.5. Of all the editions of Pamphlet 20 which have been promulgated since passage of the Hatch Act, which in the judgment of the Commission, controls in the event the Commission finds a conflict among or between any of the editions?

4.5.1. Has the Commission ever found such a conflict?

4.5.2. If "yes", then describe such conflict (or conflicts) in detail.

4.6. Are any of the determinations referred to in question 2.1, not given force and effect by Pamphlet 20?

4.6.1. If so, list with specificity each and every such determination, giving a description sufficient for use in a subpoena?

4.7. Are any of the acts referred to in question 1.1, not prohibited by Pamphlet 20?

4.7.1. If so, list with specificity each and every such act.

4.7.2. If so, by what procedure were the acts listed in question 4.7.1 determined to be not prohibited?

4.7.3. If not, is Pamphlet 20 intended to be an exhaustive statement of these acts?

4.7.4. If the answer to question 4.7.3 is "no", then by what procedure were some of these acts included in Pamphlet 20 while others were excluded?

4.7.5. Are any of the activities prohibited by the regula-

tion referred to in question 3.1, not prohibited by Pamphlet 20 of 1966?

4.7.6. If so, list with specificity each and every such activity.

4.7.7. Are any of the activities prohibited by Pamphlet 20 of 1966 not prohibited by the regulation?

4.7.8. If so, list with specificity each and every such activity.

4.8. Does the regulation referred to in question 3.0 reflect any changes in the Commission's interpretation of the statute from that reflected in Pamphlet 20?

4.8.1. If so, in light of the regulation does Pamphlet 20 possess any continuing force and effect?

4.8.2. How is that force and effect distinguished from the force and effect of the regulation?

4.8.3. In the event the Commission finds a conflict between Pamphlet 20 and the regulation, which is controlling?

4.8.4. Has the Commission ever found such a conflict?

4.8.5. If "yes", describe such conflict (or conflicts) in detail.

4.9. On page 4 of Pamphlet 20 is stated: "Section 15 (15 U.S.C.A. 118-1) states that the provisions in the act containing prohibitions against 'taking any active part in political management or in political campaigns' are deemed to include activities prohibited by the civil-service rules." To what rules does this quote refer?

4.9.1. List all the "civil-service rules" that apply to the Commission's interpretation of 5 U.S.C. § 7324(a)(2).

4.9.2. Do these "rules" include all the acts referred to in question 1.1?

4.9.3. If they do not, which of these acts are excluded from the "rules?"

4.9.4. If they do not, by what procedure and authority were the excluded acts so excluded?

4.9.5. In the event that the Commission should find a conflict between the "rules" and the pre-July 19, 1940 determinations, which controls?

4.9.6. Has the Commission ever found such a conflict?

4.9.7. If "yes", state with specificity the factual situation in which the conflict arose.

4.9.8. In the event the Commission finds a conflict between the "rules" and the regulation referred to in question 3.1, which controls?

4.9.9. In the event the Commission finds a conflict between the "rules" and Pamphlet 20 referred to in question 4.1, which controls?

4.10. Indicate any and all pre-July 19, 1940 "determinations" by the Commission to the effect that addressing a primary or caucus is impermissibly "active part in political management or in political campaigns." Cite to case name, file number and docket number.

4.11. On page 11 of "Pamphlet 20" it is stated: "Whether a committee has an ultimate political purpose determines whether an employee may properly serve as a member." List all determinations by the Commission of specific committee membership on a committee, which committee was found to have an ultimate political purpose. List all determinations by the Commission of committee membership on a committee, which committee was *not* found to have an ultimate political purpose.

4.12. On page 13 of "Pamphlet 20" it is stated: "Public expression of opinion in such a way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited." Is this language found in a pre-July 19, 1940 "determination" by the Commission?

4.12.1. If "yes", cite such determinations with specificity, giving a description sufficient for use in a subpoena.

4.12.2. If the answer to question 4.12 is "no", pursuant to what authority and by whom was the above quoted language promulgated?

4.12.3. If the answer to question 4.12 is "yes" state all the pertinent facts in that determination (or determinations) or, in the alternative, furnish a copy of the determination (or determinations).

4.13. At page 14 of "Pamphlet 20", it is stated: "Rendering partisan political service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of prohibited political activities." Indicate any and all pre-July 19, 1940 "determinations" by the Commission which rest on the assumption that transporting voters to and from the polls is a partisan political service. Cite by case name, file number and docket number.

4.13.1. By the Commission's interpretation of this quote from Pamphlet 20, is driving a voter to the polls "on

behalf of" a non-"partisan" candidate (e.g. an independent) permitted in a partisan election?

4.14. Indicate any and all pre-July 19, 1940 "determinations" by the Commission to the effect that transporting voters to and from the polls is an act prohibited as an "active part in political management or in political campaigns." Cite to case name, file number and docket number.

5.0. On May 15, 1967 John W. Macy, Jr., then Chairman of the Civil Service Commission, accompanied by, *inter alia*, Robert E. Hampton, then a Commissioner of the Civil Service Commission, testified before the Commission on Political Activity of Government Personnel. The testimony of Chairman Macy and Commissioner Hampton is published in Volume Three of the Commission Report. All "testimony" quoted or referred to herein refers to the said testimony as reported in Volume Three of the Commission Report.

5.1. In referring to the Hatch Act, Chairman Macy stated (at p. 14) that is was the Commission's view that it was important that "the coverage of the law be clarified and modified". Commissioner Hampton endorsed this view (and all others expressed in Chairman Macy's Statement) at p. 24. Is it still the policy of the Commission that the law is in need of clarification and modification?

5.1.2. If not, when was the policy changed and upon what basis was the change made?

5.1.3. If the answer to question 5.1. is "yes", then what specific clarifications does the Commission feel are needed?

5.1.4. Why does the Commission feel such clarification to be needed?

5.2. At p. 15 Chairman Macy stated the view of the Commission that: "A more positive and definitive exposition of the political rights of Government employees is warranted." Does the Commission presently endorse this position?

5.2.1. If not, when was the policy changed and upon what basis was the change made?

5.2.2. If the answer to question 5.2 is "yes", then in what ways does the Commission feel the statute at present is not sufficiently definitive with respect to the political rights of government employees?

5.3. In referring to the activities which "are prohibited as constituting taking 'an active part in political manage-

ment or in political campaigns' ", Chairman Macy indicated (at p. 15) that it was the Commission's position that "[t]he prohibitions imposed prior to that time [July 19, 1940] may not all be valid in light of present circumstances". Does this statement reflect the current position of the Commission?

5.3.1. If not, when was the position changed and upon what basis was the change made?

5.3.2. If the answer to question 5.3 is "yes", then which prohibitions seem lest valid to the Commission in light of present circumstances?

5.3.3. Does the Commission feel these may be invalid in the light of the Constitution?

5.3.4. If not "Constitutionally invalid", then invalid in what sense?

5.3.5. What "present circumstances" appear to the Commission to cast doubt on the validity of certain of these prohibitions?

5.3.6. Is the Commission currently enforcing those prohibitions it feels to be of doubtful validity?

5.4. In referring to 5 U.S.C. § 7324(a)(2), Chairman Macy stated the Commission's view that in spite of the provision's qualifying provision, "The present language is somewhat broad and somewhat uncertain." (at p. 15). Does this statement reflect the current position of the Commission?

5.4.1. If not, when was the position changed and upon what basis was the change made?

5.4.2. If the answer to question 5.4 is "yes", then in what way does the Commission feel the present language is broad and uncertain?

5.4.3. Chairman Macy immediately continued by stating: "It is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights. It is uncertain in that it fails to define with clarity and precision the types of activities which are prohibited." (at 15) Does this statement reflect the current position of the Commission?

5.4.4. If not, when was the Commission's position changed and upon what basis was the change made?

5.4.5. If the answer to question 5.4.3. is "yes", then how

does the Commission reconcile this position with the position taken in the Government Brief captioned "Motion to Dismiss" at 19-20 where it is stated that "Although the Act [the Hatch Act] concededly does limit the political freedom of action of those covered, it does so in a narrow and precise manner . . ."?

5.4.6. Does this statement from the Government's Brief represent the current view of the Commission?

5.5. In referring to 5 U.S.C. § 7324(a)(2) Chairman Macy (at 49) expressed the view of the Commission that ". . . at the present time one of the deficiencies of the present statute is that the language is very broad and very vague as to just what is permitted and consequently there does tend to be an impression on the part of many employees that the prohibited activities are really broader than they are." Does this statement reflect the current position of the Commission?

5.5.1. If not, when was the position changed and upon what basis was the change made?

5.5.2. If the answer to question 5.5. is "yes", then in the judgment of the Commission which activities tend to be construed by the employees as prohibited when, in fact and law, they are not so prohibited?

5.5.3. What efforts, if any, does the Commission put forth to correct such misconceptions?

5.5.4. In light of the position expressed and referred to in question 5.5 how does the Commission reconcile that position with the following statement in the Government's Brief (at 18): "A consideration of the Hatch Act with these standards in mind demonstrates beyond doubt that its language 'conveys sufficiently definitive warning as to the proscribed conduct when measured by common understanding and practices.'?"

5.5.5. Does this statement from the Government's Brief represent the current view of the Commission?

5.6. In referring to the qualifying provision of 5 U.S.C. § 7324(a)(2) Chairman Macy speaking on behalf of the Commission stated (at 17): "The present language tends to bind the Commission to its pre-1940 precedents." Does this statement represent the current view of the Commission?

5.6.1. If not, when was the position changed and upon what basis was the change made?

5.6.2. If the answer to the question 5.6 is "yes", in the Commission's judgment, to what degree does the provision in fact "bind" the Commission to its pre-1940 precedents?

5.6.3. To what degree is the Commission not bound to its pre-1940 precedents?

5.7. Speaking on behalf of the Commission, Chairman Macy stated (at 25): ". . . I do believe that in the light of certain decisions of the Supreme Court, it is important that this worthwhile statute be redrafted to avoid any possibility of subsequent determination [of unconstitutionality]." Is this position currently held by the Commission?

5.7.1. If not, when was the position changed and upon what basis was the change made?

5.7.2. If the answer to question 5.7 is "yes", then to what decisions of the Supreme Court does the Commission alude?

5.7.3. List all such decisions.

6.0. Has the Commission considered the implementation of any less restrictive alternatives to the Hatch Act?

6.1. If so list these.

6.2. If so, what, if anything, is being done to implement these alternatives?

7.0. Has the Commission prepared any draft legislation to replace the Hatch Act since Jan. 1, 1970?

7.1. If "yes", is the legislation less restrictive in prohibiting "active participation in political management or in campaigns?"

7.1.2. If so, what determinations, as referred to in question 2.1, would no longer be enforced by the provisions of the draft statute?

7.1.3. If so, what acts, as referred to in question 1.1, would not be prohibited by the provisions of the draft statute?

8.0. Does the Commission consider the survey research in Vol. 2 of the Report of the Commission on Political Activity of Government Personnel to be a methodologically sound survey?

8.1. Does the Commission consider that the survey referred to in question 8.0 employed "the proper universe" for a sample?

8.2. Does the Commission consider that the survey referred to in question 8.0 employed an acceptably "random sample" of that universe?

8.3. If the answer to question 8.0 is "no", what specific objections does the Commission have as to the methodological validity of the survey?

9.0. Has the Commission undertaken surveys to determine the attitudes and opinions of employees (as defined in question 2.5) as to the effect of the statute upon them?

9.1. If so, list with specificity such surveys, describing them in detail sufficient for identification in a subpoena.

9.2. How do the conclusions of such surveys differ from the conclusions reached in the survey referred to in question 8.0?

9.3. Does the Commission consider the survey or surveys listed in question 9.1 to be methodologically sound?

9.3.1. If "no", what specific objections does the Commission have as to the methodological validity of any such survey?

Please take notice that a copy of the answers must be served upon the undersigned within 30 days after the service of the interrogatories.

Dated: June 30, 1971.

WALD, HARKRADER, NICHOLSON & ROSS

By:

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A partner
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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

MOTION TO DISMISS

Defendants, by their undersigned attorneys, hereby move the Court to dismiss this action pursuant to Rule 12 of the Federal Rules of Civil Procedure. The grounds for this motion are that the complaint fails to state a justiciable case or controversy sufficient to give this Court jurisdiction under Article III of the Constitution and, further, because the complaint fails to state a claim upon which relief can be granted. In support of this motion, the Court is respectfully referred to the Points and Authorities filed herewith.

Respectfully submitted,
L. PATRICK GRAY, III
Assistant Attorney General

THOMAS A. FLANNERY
United States Attorney

HARLAND F. LEATHERS
DAVID J. ANDERSON
Attorneys, Department of Justice
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

ORDER

This matter having come before the three-judge court for argument on the defendants' motion to dismiss and the Court having determined that limited discovery shall be granted plaintiffs before ruling on said motion, it is hereby

ORDERED that

(1) Defendant Civil Service Commission shall on or before September 1, 1971, file with the Clerk of Court legible copies of all determinations made by the Commission prior to July 19, 1940, under rules prescribed by the President which are incorporated into the Hatch Act by reference under the provisions of Section 15 thereof;

(2) Defendant Civil Service Commission shall on or before September 1, 1971, file a formal written statement with the Court setting forth the procedures followed by the Commission when it is requested by an individual government employee, union of government employees, or political committee to give an advisory ruling as to the coverage of the Act as it may relate to a particular proposed action or course of conduct, including whether or not specific rulings prior to July 19, 1940, are cited or provided in response to such inquiry;

(3) The parties may file further briefs on the motion to dismiss within one month or by October 1, whichever is later, following the Commission's compliance with paragraphs (1) and (2) above.

(4) Except as here provided, no further discovery by the parties is authorized pending determination of the motion to dismiss.

For the Court
GERHARD A. GESSELL
United States District Judge

July 23, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AFFIDAVIT IN RESPONSE TO ORDER OF JULY 23, 1971

COMES Now the affiant, ANTHONY L. MONDELLO, and says as follows:

Since April 15, 1968, I have served as General Counsel to the Defendant United States Civil Service Commission (Commission). The Office of the General Counsel is responsible for the administration and enforcement of the Federal political activity statutes (the "Hatch Act"), the Civil Service Rule on political activity currently set out at 5 CFR 4.1, and implementing regulations found at 5 CFR parts 151 and part 733. As a matter of Commission policy, all matters involving political activity are handled by the Washington, D.C., central office, rather than by the Commission's several regional offices.

The Office of the General Counsel is divided into a Legal Advisory Section and an Enforcement and Litigation Section, each Section administered by an Assistant General Counsel. The Enforcement and Litigation Section is subdivided into three units: the Litigation Unit, the Political Activity Enforcement Unit, and the Political Activity Information Unit. The Information Unit answers inquiries, from whatever source, concerning the application of the Hatch Act, Rule, and regulations. It is estimated that some five hundred written requests for political activity opinions are received annually. It is further estimated that telephone requests for information account for another four hundred informal opinions each year.

When this Office is requested to furnish an advisory opinion as to the applicability of the Hatch Act, it has been our policy and practice to tailor the opinion to the particular source of the query. For example, if an opinion is requested by an attorney, a labor organization, a governmental agency, or a political organization, our response is relatively full, and it is likely that our opinion would encompass legislative history, citations to pertinent decisions (judicial and administrative), and citations to appropriate statutes and regulations. In other cases, however, where an

individual in an unofficial or unrepresentative capacity seeks a "yes—or—no" answer to his particular question, we usually briefly outline the salient legal principles, and then apply those principles to the factual situation at hand. In these latter types of cases, specific statutes, regulations or legislative history are not normally discussed but are only mentioned in passing.

As a practical matter, the Commission's political activity determinations made prior to July 19, 1940, are not cited or provided in response to inquiries. This situation prevails for several reasons:

1. Prior to 1940, both partisan and nonpartisan political activity were prohibited under the Civil Service Rules. Under the 1940 amendments to the Hatch Act (§ 18 of the Act, 54 Stat. 772, now codified as 5 U.S.C. §§ 1503 and 7326), employees were not prohibited from participating in nonpartisan activity. Thus, the pre-1940 determinations prohibiting nonpartisan political activity have been ineffective since July 19, 1940.
2. For many years prior to 1940, the Commission had published its Form 1236, a distillation of the Commission's political activity decisions under the Civil Service Rules. As a matter of administrative convenience, if not necessity, this distillation was designed to answer most of the political activity questions which the experience of the Office showed would recur. When the 1940 amendments to the Hatch Act were under consideration, a question was raised as to what were the determinations alluded to by proposed section 15 of the Act. (86 Cong. Rec. 2937). In other words, the Senate wished to find out the nature and extent of the substantive prohibitions contemplated by section 15. Senator Hatch replied by placing the substantive portions of Form 1236 into the record (86 Cong. Rec. 2938-40). Later in the debate, a consensus formed around the idea that it would be impossible to completely list in the statute all those activities in which employees could not engage (id., pp. 2948-54), and section 15 of the Act in its present form was ultimately approved as providing sufficient guidance for the Com-

mission to decide the merits of new factual situations as they arose.

In the light of this recognition in the legislative history that Form 1236 was the effective equivalent, for the factual situations it covered, of the pre-1940 determinations of the Commission, the Commission made extensive use of Form 1236 in its earlier decisions under the Hatch Act. Until the late 1940's, Form 1236 was also used extensively in the formulation of advisory opinions released by the Office of the General Counsel. As time passed, however, both the Commission and the General Counsel made more and more use of decisions and opinions issued under the Hatch Act, and placed less and less reliance on Form 1236 as the body of post-Hatch Act precedent became enlarged.

The end result is that the Commission and the Office of the General Counsel today rely almost entirely on post-Hatch Act precedents, precedents which are based ultimately on the substantive content of Form 1236 and the Commission's pre-1940 determinations.

3. The Office of the General Counsel has consistently endeavored to place its operations within the scope of both specific court decisions (e.g., *Wilson* v. *United States Civil Service Commission*, 136 F. Supp. 104, D.D.C. 1955), and discernible trends in judicial decisions generally. We certainly are aware of the great advances in the areas of individual liberties and due process that have taken place since 1940, and we attempt to administer the Hatch Act in the context of currently accepted constitutional doctrine and other legal doctrines. Should such doctrine collide with a strict interpretation of the Act, the Rule, or past administrative decisions, it is our policy that the current doctrines by which we are bound will prevail.

Attached hereto, and incorporated into this affidavit by reference, are copies of samples of advisory opinions issued by this Office within the past two years. Names and identifying information have been deleted in order to protect the privacy of the addressees.

I HEREBY CERTIFY that the foregoing is accurate and complete to the best of my knowledge and belief.

ANTHONY L. MONDELLO
General Counsel

[Acknowledgment and Certificate of Service Omitted in Printing]

[Attachment to Affidavit of Anthony L. Mondello]

Aug. 17, 1970

..... Esquire
Counselors at Law
Newark, New Jersey 07102

Dear Mr.

This is in response to your letter of July 24, 1970, requesting an opinion as to whether the provisions of 5 U.S.C. 7324 are applicable to ....., a Director of the Panama Canal Company.

Under section 61(a) of title 2, Canal Zone Code, the Panama Canal Company is a Government corporation and, as such, is an Executive agency as defined in section 105 of title 5, United States Code. In addition, the members of the Company's Board of Directors are appointed either by the President of the United States or by the Company's "stockholder", who is a Presidential designee. 2 C.Z.C. 63(a). An "employee" of the United States is defined in part as an individual who is appointed in the civil service by the President or the head of a Government controlled corporation engaged in the performance of a Federal function and is subject to the supervision of one of the named classes of individuals, including the President or head of a Government controlled corporation.

By synthesizing these various provisions, we would conclude that a Director of the Panama Canal Company is a civil service employee in the Executive Branch of the Federal Government. As such, a Director would be covered by the Federal law on political activity, 5 U.S.C. 7321-7327, formerly the Hatch Act.

It is our opinion, therefore, that ....., as a Director of the Panama Canal Company, is subject to the restrictions of the Hatch Act. However, if Mr. ..... serves on an irregular or intermittent basis in his capacity as a Director, he would be subject to the political activity restrictions while in an active duty status only, and only for the entire twenty-four hours of any day of actual Federal employment. See p. 8 of Pamphlet 20, as indicated.

The foregoing is predicated upon our assumption that Mr. ..... occupies no other governmental position,

Federal, State, or local, that would bring him within the prohibitions of the political activity law.

We trust this information will be of use to you.

Sincerely yours,
ANTHONY L. MONDELLO
General Counsel

[Attachment to Affidavit of Anthony L. Mondello]

Mar. 30, 1971

Mrs. .....
Apartment Two
..... N.W.
Washington, D.C. 20016

Dear Mrs. .....

We have received your letter of March 24, 1971.

Under the Hatch Act and Civil Service Rules, there would be no objection for you, as a Federal employee, to personally address the National Federation of Republican Women on the subject of "Women in Public Service in the Government."

We wish you every success in presenting this address.

Sincerely yours,
PATRICK M. GALLAGHER
Attorney

[Attachment to Affidavit of Anthony L. Mondello]

Aug. 13, 1971

Mrs. .....
Executive Secretary
Local Board Number .....
Selective Service System
Helena, Montana 59601

Dear Mrs.

Your letter of July 30, 1971, addressed to Mrs. Betty Mayer of the Commission's Helena Area Office, has been referred to this office for reply.

Under section 463(a) of title 50, United States Code (appendix), as amended, an uncompensated official of the Selective Service System is not subject to the restriction on political management and political campaigning set out as section 7324(a)(2) of title 5, United States Code. Thus, such an official may properly be a candidate in an election for public office, and may hold public office while serving with the Selective Service System.

Sincerely yours,
JOHN W. EARMAN
Senior Attorney

[Attachment to Affidavit of Anthony L. Mondello]

Aug. 24, 1971

Mr. .....
Manager-Chief Counsel
..... Water District
Post Office Box ....
Fresno, California 93755

Dear Mr. .....

This is with reference to your recent letter in which you ask our opinion as to the applicability of the Hatch Act (5 U.S.C. 1501 et seq.) to employees of the ..... Water District. I am sorry that we have been so long in answering, but we found it necessary to conduct considerable research and factual investigation before we could effectively respond to your query.

The threshold question is whether the ..... Water District may be considered a State or local agency within the purview of 5 U.S.C. 1501(2). We answer in the affirmative.

Under the California Water District Law, as amended, the individual water districts exercise a wide variety of typically governmental functions. The water districts may issue obligations such as general bonds and revenue bonds, and remain solely liable for such outstanding obligations. The water districts may exercise the power of condemnation and eminent domain in the acquisition of property, which has classically been the prerogative of the sovereign. The water districts may levy both preliminary and *ad valorem* assessments against holders of title to land within the district, and may compel a delinquency sale of realty for nonpayment of assessments. Violations of a water district's rules and regulations for water distribution are punishable as misdemeanors. Also, we note that the county board of the principal county of each water district declares, after election, that a water district has been formed and issues certificates of election to those elected to office in the water district. Finally, we note that the various water districts are municipal corporations under California law. See *Rock Creek Water District* v. *Calaveras County*, 172 P.2d 863 (1946).

When the California Water District Law is read as a

totality, we conclude that the various water districts are executive agencies of a political subdivision (the principal county) of the State. As such, the individual water districts are "State or local agency[s]" as that term is employed by 5 U.S.C. 1501(4).

The second question presented is whether the ..... Water District includes "an activity which is financed in whole or in part by [Federal] loans or grants" . . . 5 U.S.C. 1501(4). This we answer negatively.

Our understanding of the present factual situation is that ..... Water District is a party to two contracts with the Bureau of Reclamation: a water services contract and a distribution system contract. The water services contract is an arrangement whereby ..... purchases water on a per-acre-foot basis from the Bureau of Reclamation. Our view is that the water services contract is purely a purchase and sale agreement, and that no Federal loans or grants are involved under this contract.

With respect to the distribution system contract, it is our understanding that ..... distribution system is being constructed as a so-called 'section 9d project"; as such, the ..... distribution system is not being developed under the Distribution System Loan Act. We understand that the Bureau of Reclamation is building the distribution system with appropriated funds, and that ..... will reimburse the capital costs of the system over a period of forty years, free of interest. Title in the affected realty is vested in the United States until Congress provides otherwise. Under these circumstances, we are unable to conclude that the financial arrangements arising from the distribution system contract constitute a Federal loan or grant as contemplated by 5 U.S.C. 1501(4).

Needless to say, this opinion is based upon our understanding of the current financial relationship between ..... Water District and the United States. If ..... was to receive Federal loans or grants at some future time, it would then become necessary for us to reexamine our present position in the light of such new fiscal developments.

We hope this information will be helpful to you.

Sincerely yours,
J. JAMES MCCARTHY
Assistant General Counsel

[Attachment to Affidavit of Anthony L. Mondello]

Nov. 5, 1969

Mr. .....
Deputy Chairman
..... National Committee
Washington, D.C. 20006

Dear .....

Thanks for your letter of October 22 and the enclosed copy of the letter and news clipping from ..... of Minnesota.

As you know, the Hatch Act bars partisan political activity; nonpartisan activity is not restricted by the statute. Any Minnesota state or local employee is covered by the Act if his principal job is connected with a Federally funded activity.

Employees covered by the statute have the right to join political parties and other political organizations, express their opinions on political subjects and candidates, and make financial contributions for political purposes. However, they may not accept office in a partisan political organization or campaign in behalf of a partisan candidate.

I am advised that the Minnesota Election Law provides for nonpartisan elections for the offices of justice of the supreme court, judges of the district and probate courts, all members of the state legislature, and all elected county officials. This Commission has held that endorsement of a candidate by a political party does not transform a nonpartisan election into a partisan election for purposes of the Hatch Act.

We recognize the political reality that often an election which is by law nonpartisan can become partisan in fact. Apparently, this is what occurs in Minnesota where many of the candidates on a nonpartisan ballot are generally known by their party affiliations and, for certain offices, receive the backing of political parties.

The same situation occurs in other jurisdictions where the law prescribes nonpartisan elections for particular offices. Among the larger cities, Los Angeles, for example, has "nonpartisan" elections for municipal offices; but candidates for mayor are known by their party affiliation;

that is, as either a Democratic candidate or a Republican candidate. Party alignment and support, as well as other indicators of partisanship, characterize the Los Angeles mayorality contest, yet we have ruled that employee participation in that election is not prohibited by the Hatch Act.

We believe the statute requires the Commission to rule that where state or local law prescribes a nonpartisan election, the Hatch Act does not prohibit covered employees from participating. This result is based on our interpretation of the Federal statute, as I will explain briefly.

The pertinent language of the law is as follows:

> "Section 1502(a)(3) of this title does not prohibit political activity in connection with—
>
> (1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected...." (5 U.S.C. 1503)

Notice that the terms "partisan" and "nonpartisan" are not used. Rather, in applying the statutory language to a particular election the test is whether the voters may cast their votes for a candidate who is designated as officially representing a national or state political party for the office involved. If no candidate is so identified either on the ballot or by the fact that a party nomination (by primary or other means) is involved, we are compelled to follow the statutory exception quoted above.

The Supreme Court of Minnesota reviewed an election challenge involving the endorsement of a nonpartisan candidate by a political party, but found that the candidate who obtained the endorsement did not thereby violate the State election law. *Moon* v. *Halverson*, 206 Minn. 331; 288 N.W. 579 (1939). The court observed:

> "The candidate for the nonpartisan office is not thereby rendered a party candidate. Rather he is an individual supported by a party and free to encourage support from other sources, political and non-political." (Page 581)

To this extent, therefore, the Commission shares the view expressed by the court.

If we attempted to apply the more commonly used definitions of partisanship as the test for determining whether employee participation is permissible, there would be obvious difficulties and uncertainties not only for employees, but also for the Commission in administering the law. Under that criterion it could not be determined in advance whether an election campaign that begins on a nonpartisan footing might become "partisan" at some later point by the intrusion of either political organizations or what some might regard as partisan issues.

Thus, we believe our interpretation in not only supported by the words of the statute, but also settles one area of possible uncertainty in a law that is in some respects not adequately understood by the employees it affects.

In consequence . . . . . , I don't see any way that this Commission can limit the involvement of State employees in nonpartisan political activity, even if the employees are covered by the Hatch Act. Of course, even in a nonpartisan election, an employee covered by the Act cannot become a campaign worker or manager for a state or national political party. Needless to say, we will always take action when we hear about partisan activity on the part of any employee covered by the Act.

I'm sorry not to be of more help to you and . . . . . .

Sincerely yours,
ROBERT E. HAMPTON
Chairman

[Attachment to Affidavit of Anthony L. Mondello]

Jul. 19, 1971

....., Esquire

.....

.....

Washington, Pennsylvania 15301

Dear Mr. .....:

Your letter of July 1, 1971, addressed to Attorney General Mitchell, has been referred to this office for reply. In this letter, we shall attempt to delineate the general principles underlying the "Hatch Act" (5 U.S.C. 1501-1508), and then apply these principles to Mr. .....'s situation.

State and local employees subject to 5 U.S.C. 1501 *et seq.* are required to abstain from active participation in partisan political management and partisan political campaigns and elections. See *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Oklahoma* v. *U.S. Civil Service Commission*, 330 U.S. 127 (1947). An election and preceding campaigning is considered partisan if any of the candidates for the office in question represents a State or national political party. See *In the Matter of Dean, CSC Docket No. 231* (1959); *In the Matter of Lesniak, CSC Docket No. 271* (1969). In turn, a State or national political party is one "... any of whose candidates for presidential elector received votes in the last preceding [presidential] election ...". Employees covered by the Hatch Act are free to engage in nonpartisan political activity. 5 U.S.C. 1503.

State and local employees are subject to the restrictions on political management and campaigning when their principal employment is in connection with an activity wholly or partially financed by Federal loans or grants. 5 U.S.C. 1501(4). From the information contained in your letter, it is not clear whether Mr. .....'s position with the Pennsylvania Department of Transportation constitutes his "principal employment," nor is it certain that the activity with which Mr. ..... is employed receives Federal funding. If you will furnish this information, perhaps we can give you a more definitive answer as to Mr. .....'s status under the Hatch Act.

Sincerely yours,

PATRICK M. GALLAGHER

Attorney

[Attachment to Affidavit of Anthony L. Mondello]

Apr. 5, 1971

Mrs. .....
Wheat Ridge, Colorado 80033

Dear Mrs. .....:

We have received your letter of March 25, 1971, which relates to the applicability of the Hatch Act to the organization known as *Common Cause*.

Common Cause is an issue-oriented organization not associated or identified with a State or national political party. In our opinion, Federal employees may properly become members in *Common Cause*, and may participate fully in the organization's activities. Needless to say, employees subject to the Hatch Act may not do in the name of *Common Cause* what they could not do prior to joining *Common Cause*. Stated another way, a Federal employee who engages in prohibited political activity under the direction or at the suggestion of the leaders of *Common Cause* will be held personally accountable for his own actions, regardless of whether he has acted as an individual or as a member of a group.

Enclosed is a copy of the recently revised political activity regulations for Federal employees.

Sincerely yours,
PATRICK M. GALLAGHER
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

ORDER

Upon consideration of memoranda from the parties and oral argument before the three-judge court, it is hereby ORDERED that defendants' motion to dismiss the action be, and it is hereby, DENIED.

For the Court
GERHARD A. GESSEL
United States District Judge

November . . ., 1971

No objection as to form:

David J. Anderson
DAVID J. ANDERSON
U. S. Department of Justice
Counsel for Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFFS' INTERROGATORIES TO DEFENDANTS
(SET NO. 2)

(Set No. 1 contained interrogatories numbered 1 through 9 with various subheadings. This Set No. 2 therefore starts with interrogatory no. 10).

The plaintiffs request that the defendant Civil Service Commission answer, under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories numbered 10 through 14, and that the individual defendants who are members of the Commission answer the following interrogatory numbered 15:

10.0. As used in questions 10.1 through 10.1.2, the word "acts" means those acts of political management or campaigning listed by defendant in response to question 1.1 except that it does not include any acts listed by defendant in response to questions 1.2.1 or 1.3.1.

10.1. Does the defendant Civil Service Commission contend that some governmental interest compels the prohibition of each and every act?

10.1.1. If the answer to question 10.1 is "yes", identify with as much detail and particularity as possible for each and every act each and every governmental interest that compels its prohibition and explain in full detail why the prohibition is required to protect that interest.

10.1.2. If the answer to question 10.1 is not an unqualified "yes", identify each and every act whose prohibition is so compelled, and for each such act identify each and every governmental interest that compels its prohibition and explain in full detail why the prohibition is required to protect the interest.

11.0. Does defendant Civil Service Commission contend that all governmental interests identified in response to questions 10.1.1 and 10.1.2 would not be adequately protected by a statute that prohibited fewer acts than does Section 9 of the Hatch Act?

11.0.1. If the answer to question 11.0 is "no", outline the statute that defendant believes would adequately protect all such interests.

11.1. Does defendant Civil Service Commission contend that the statute proposed by the Commission on Political Activity of Governmental Personnel (REPORT, vol. 1, 1967) would not adequately protect all governmental interests identified in response to questions 10.1.1 and 10.1.2?

12.0 Identify each and every act or activity of partisan political management or campaigns which, if engaged in by an employee subject to the Hatch Act, would impair the efficiency, integrity or neutrality of (a) the employee, or (b) the civil service.

12.1 As to each such act or activity, explain the impairing effect.

12.2 Would each and every act have an impairing effect if only engaged in while off duty?

12.3. If the answer to question 12.2 is "no", identify those acts or activities as to which the answer applies and explain the reasons for the answer.

13.0. As to each act or activity identified in response to question 12.0, explain how the impact on (a) the employee and (b) the civil service would differ if the act or activity were not related to a "political party" as that term is defined at 5 C.F.R. § 733.101(c), or, in other words, explain the difference in impact between partisan and non-partisan activity.

14.0. With respect to the affidavit of Anthony L. Mondello,[1] identify with particularity each instance where the defendant Commission or its staff has determined that a "currently accepted constitutional doctrine or other legal doctrines" collided with "a strict interpretation of the Act, the Rule, or past administrative decisions." Identify all such determinations, whether in the context of formal or informal advisory opinions, enforcement action or inaction, or otherwise.

15.0. Does each individual member of defendant Civil Service Commission subscribe to each and every answer given on behalf of the Commission in response to interrogatories 1 through 11?

15.1. If the answer to question 15.0 is "no", identify

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[1] General Counsel of defendant Commission. Affidavit filed September 1, 1971, in response to an Order of the Court.

each disagreeing member and set forth separately the reasons for each of his or her disagreements.

Please take notice that a copy of the answers must be served upon the undersigned within 30 days after the service of the interrogatories.

Dated: November 5, 1971

WALD, HARKRADER, NICHOLSON & ROSS
By:
THOMAS C. MATTHEWS, JR.
A Partner
Attorney for Plaintiff
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
Tel.: 296-2121

Of Counsel:

RALPH J. TEMPLE
American Civil Liberties Union
1424 16th Street, N.W.
Washington, D.C. 20036

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

ANSWER

First Defense

Defendants, by their undersigned attorneys, in answer to the numbered paragraphs of the complaint, hereby admit, deny and allege as follows:

1. The first paragraph of the complaint sets forth conclusions of law and not allegations of fact requiring answer. However, if an answer is deemed to be required, denied.

2. Admitted.

3. Defendants admit the first sentence of paragraph three and admit that the plaintiff Democratic and Republican Committees are unincorporated associations. Defendants deny the remaining allegations set forth in paragraph three for lack of information or knowledge sufficient to form a belief as to their truth.

4. Defendants admit the allegations set forth in the second sentence of paragraph four. Defendants deny the remaining allegations set forth in paragraph four for lack of information of knowledge sufficient to form a belief as to their truth.

5. Defendants admit the allegations set forth in the second sentence of paragraph five. Defendants deny the remaining allegations set forth in paragraph five for lack of information or knowledge sufficient to form a belief as to their truth.

6. Defendants admit the allegations set forth in the second sentence of paragraph six. Defendants deny the remaining allegations set forth in paragraph six for lack of information or knowledge sufficient to form a belief as to their truth.

7. Defendants admit the allegations set forth in the second sentence of paragraph seven. Defendants deny the remaining allegations set forth in paragraph seven for lack of information or knowledge sufficient to form a belief as to their truth.

8. Defendants admit the allegations set forth in the second sentence of paragraph eight. Defendants deny the re-

maining allegations set forth in paragraph eight for lack of information or knowledge sufficient to form a belief as to their truth.

9. Defendants admit the allegations set forth in the second sentence of paragraph nine. Defendants deny the remaining allegations set forth in paragraph nine for lack of information or knowledge sufficient to form a belief as to their truth.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Defendants deny for lack of knowledge or information sufficient to form a belief as to their truth, the allegations in paragraph fourteen regarding the capacity in which plaintiffs breathe this suit, and deny any remaining allegations of that paragraph.

15. Denied.

16. The first sentence set forth in paragraph sixteen is a statement of the purpose of this suit, and does not appear to require answer. Defendants admit so much of the second sentence of paragraph sixteen as alleges that the Civil Service Commission has in the past enforced and continues to enforce the political management and political campaigning provisions of the Hatch Act against those subject to its terms. The remaining allegations of this paragraph are denied.

17. The allegations set forth in the first sentence of paragraph seventeen are denied for lack of knowledge or information sufficient to form a belief as to their truth, except that defendants admit that the Civil Service Commission has and will enforce the provisions of the Hatch Act against those employees subject to its terms. The allegations set forth in the remainder of paragraph seventeen are denied for lack of knowledge or information sufficient to form a belief as to their truth.

18. Defendants admit so much of the first sentence of paragraph eighteen as alleges that the Civil Service Commission enforces the provisions of the Hatch Act against covered employees, and denies the remainder of that sentence. The remaining allegations of paragraph eighteen are denied.

19. Denied.

20. Defendants deny the allegations set forth in paragraph twenty for lack of information or knowledge sufficient to form a belief as to their truth.

21. Defendants deny the allegations set forth in paragraph twenty-one for lack of information or knowledge sufficient to form a belief as to their truth.

22. Defendants admit to the allegations set forth in the first sentence of paragraph twenty-two. Defendants deny the remaining allegations set forth in paragraph twenty-two for lack of information or knowledge sufficient to form a belief as to their truth.

23. Defendants deny the allegations set forth in paragraph twenty-three for lack of knowledge or information sufficient to form a belief as to their truth, except that defendants admit that plaintiff Wylie on or about July 12, 1970, resigned from permanent employment as Director, Political and Legal Analysis Branch, National Center for Health Services Research and Development, Department of Health, Education and Welfare, a position in the competitive Civil Service, and defendants further admit that from or about July 11, 1970 until November 3, 1970 plaintiff Wylie was employed by the Department of H.E.W. as a consultant on a part-time basis, and that plaintiff Wylie subsequently sought to be employed by H.E.W. on a permanent basis, and that in early December, 1970 he was requested by an H.E.W. personnel officer that, before he be reemployed on a permanent basis, he sign a statement that, on the days when he had served as a consultant, he did not engage in political management or political campaigning prohibited by the Hatch Act, and that plaintiff Wylie declined to sign this statement.

24. Defendants admit the allegations set forth in the first sentence of paragraph twenty-four. Defendants deny the remaining allegations set forth in paragraph twenty-four for lack of information or knowledge sufficient to form a belief as to their truth.

25. Defendants admit the allegations set forth in the first sentence of paragraph twenty-five. Defendants deny the remaining allegations set forth in paragraph twenty-five for lack of information or knowledge sufficient to form a belief as to their truth.

26. Denied.

27. Denied.

28. Denied.

All allegations not hereinbefore expressly admitted, denied, or modified are hereby denied.

Second Defense

The complaint fails to set forth a justiciable case or controversy.

Third Defense

Plaintiffs lack standing to maintain this action.

Fourth Defense

The defendant United States Civil Service Commission is not a suable entity.

Fifth Defense

The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants, having fully answered, hereby ask the Court to dismiss this action.

Respectfully submitted,
L. PATRICK GRAY, III
Assistant Attorney General

THOMAS A. FLANNERY
United States Attorney

HARLAND F. LEATHERS
DAVID J. ANDERSON
Attorneys, Department of Justice
Attorneys for Federal Defendants

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DEFENDANTS' OBJECTIONS TO INTERROGATORIES

Defendants, by their undersigned attorneys, hereby object to Sets No. 1 and 2 of plaintiffs' interrogatories as follows:

1. Defendants object to each and every one of the interrogatories served upon them in plaintiffs' Set No. 1 and Set No. 2 on the ground that they are neither relevant nor material to the subject matter of this action which involves the validity, on its face, of an Act of Congress, and because these interrogatories seek to elicit legal conclusions and attempts to improperly probe the mental processes of the defendants. In addition to this general objection, defendants object more particularly to individual interrogatories as stated hereafter.

2. Defendants object to interrogatories No. 1.2.1, 1.2.2, 1.3.1, 1.3.2, and 1.3.3. to the extent that they require an answer more detailed than simply stating categories of cases designated in answer to interrogatory 1.1, on the ground that the Civil Service Commission makes such determinations on a case-by-case basis when they arise before the Agency in its enforcement capacity, and that responses to these interrogatories in greater detail would amount to the issuance of an advisory opinion.

3. Defendants object to interrogatories No. 2.9.2, 2.9.3, and 2.9.4, on the same ground noted in paragraph 2, *supra*.

4. Defendants object to interrogatories No. 3.2, 3.3, 3.3.1, and 3.3.2 on the ground that this suit does not involve the validity or construction of the regulations published at 5 C.F.R. 733.122 or the administration of the Hatch Act.

5. Defendants object to interrogatories No. 4.1, 4.1.2, 4.1.3, 4.2, 4.2.1, 4.3, 4.3.1, 4.4, 4.5, 4.5.1, 4.5.2, 4.6, 4.6.1, 4.7, 4.7.1, 4.7.2, 4.7.3, 4.7.4, 4.7.5, 4.7.6, 4.7.7, 4.7.8, 4.8, 4.8.1, 4.8.2, 4.8.3, 4.8.4, and 4.8.5 on the ground that this suit does not involve the validity or interpretation of Pamphlet 20 or the administration of the Hatch Act.

6. Defendants object to interrogatories No. 4.11, 4.12,

4.12.1, 4.12.2, 4.13, and 4.13.1, on the same ground noted in paragraph 5, *supra*.

7. Defendants object to interrogatories 5.1 through 9.3.1 on the ground that they seek advisory opinions as to the Commission's view toward hypothetical cases and seek to elicit the opinion of the Commission on subjects which are irrelevant and immaterial to this lawsuit.

8. Defendants object to interrogatories 10 through 15.1 on the same ground as indicated in paragraph 7, *supra*.

Respectfully submitted,
L. PATRICK GRAY, III
Assistant Attorney General

THOMAS A. FLANNERY
United States Attorney

HARLAND F. LEATHERS
DAVID J. ANDERSON
Attorneys, Department of Justice
Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

ORDER

This matter having come before the Court on defendants' Objections to Plaintiffs' Sets No. 1 and 2 of Interrogatories, and the Court having considered these objections and having heard counsel in Chambers and being fully advised in the premises, and the Court having previously denied defendants' Motion to Dismiss this action and being of the opinion that a further development of the record herein is appropriate, it is therefore this .. day of November, 1971 hereby

ORDERED:

1. Defendants' general objection to each and every one of the interrogatories in Sets No. 1 and 2 of plaintiffs' interrogatories on the ground of irrelevancy and immateriality be and is hereby overruled.

2. Defendants' more specific objection in part to interrogatories No. 1.2.1, 1.2.2, 1.3.1, 1.3.2 and 1.3.3, be and is hereby sustained and defendants are required to answer these interrogatories only to the extent of designating descriptive categories.

3. Defendants' specific objections to interrogatories No. 2.9.2, 2.9.3, 2.9.4, 3.2, 3.3, 3.3.1, 3.3.2, 4.1 through 4.3.1, 4.5 through 4.8.5, 4.11, 4.13, 4.12, 4.12.1, 4.12.2, 4.13.1, and 5.1 through 7.1.3 be and are hereby sustained. Defendants' objection to interrogatory 4.4 be and is hereby overruled.

4. The defendants' specific objections to interrogatories 8.0 through 9.3.1 be and are hereby sustained, except that if defendants intend to challenge the statistical validity of the survey designated in these interrogatories they shall indicate the basis for such challenge in writing prior to the hearing date to be established by this Court.

5. Defendants' objections to interrogatories No. 10 through 15.1 be and are hereby sustained, except that the objection to interrogatory No. 14 be and is hereby overruled.

6. The Court notes that plaintiffs have withdrawn interrogatories No. 2.1 through 2.6.4, 2.7.2, 2.8, 2.8.4 through 2.9.1, 2.9.5 through 2.9.7, 3.5 through 3.17, 4.12.3 and 4.14, and the defendants are not required to respond to same.

7. The defendants are ordered to serve their answers to the interrogatories on which objections have been overruled within 30 days of the date of this Order, by which date the parties are directed to have exchanged with each other all material which they propose to submit as part of their direct case. The parties are also directed to file closing briefs within 60 days of the date of this Order. The parties will be advised when the Court fixes a final hearing date in this matter.

GERHARD A. GESSEL
United States District Judge

No objection as to form:

THOMAS C. MATTHEWS, JR.
Attorneys for Plaintiffs

DAVID J. ANDERSON
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

NOTICE OF DEPOSITION

Please take notice that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, plaintiffs will take the deposition upon oral examination of the United States Civil Service Commission at the offices of Wald, Harkrader & Ross, 1320 Nineteenth Street, N.W., Washington, D. C. 20036, beginning at 9:30 A.M. on Monday, January 17, 1972, and continuing from day to day until the examination is concluded.

The matters on which examination is requested are:

1. Whether all the acts prohibited by Section 15 of the Hatch Act are needed to insure the effective functioning of the Civil Service and what effect the absence of certain of the prohibitions would have upon the effective functioning of the Civil Service.
2. Whether employees subject to the Hatch Act are in fact confused about the scope of its prohibitions and whether the Commission has been able, through its various publications, to eliminate that confusion.

The deposition will be taken before a Notary Public or other person authorized to administer oaths under the laws of the District of Columbia. You are invited to attend.

THOMAS C. MATTHEWS, JR.
STEPHEN M. TRUITT
Wald, Harkrader & Ross
1320—19th Street, N.W.
Washington, D. C. 20036
296-2121
Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DEFENDANTS' ANSWER TO INTERROGATORIES

Pursuant to Rule 33, Federal Rules of Civil Procedure, Anthony L. Mondello, General Counsel of the Civil Service Commission, being first duly sworn, in answer to those interrogatories served upon defendants by plaintiffs on June 30, 1971 and November 5, 1971, as to which the Court has overruled defendants' objections, hereby deposes and says:

1.1. List with specificity each and every act of political management or campaigning which was prohibited "on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

A. In response to this interrogatory, defendants refer plaintiffs to the pre-July 19, 1940 determinations of the Commission which were filed with the Court pursuant to court order dated July 23, 1971; and to paragraphs 11 through 34 of the September 1939 edition of Form 1236 which are reprinted at 86 Cong. Rec. 2938-2940. A copy of the September 1939 edition of Form 1236 is attached hereto as Exhibit A and incorporated herein by reference.

1.2. Is each act listed in response to question 1.1 prohibited by the statute as presently interpreted by the Civil Service Commission?

A. No.

1.2.1. If the answer to question 1.2 is "no", then specify which of the listed acts are no longer deemed prohibited.

A. (1). Those acts which are in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential electors received votes in the last preceding election at which presidential electors were selected; or which are in connection with any question which is not specifically identified with a National or State political party.

Representative of this category are:

a. activity in connection with questions relating to

constitutional amendments, referandums, approval of municipal ordinances and others of similar character;

b. serving in an impartial manner as an election officer;

c. activity in connection with political questions or governmental issues which are not connected with a national or State political party.

(2) Public expression of opinion on political subjects and candidates.

Representative of this category are:

a. the wearing of political badges and buttons; and

b. talking politics in public

(3) Holding public office.

1.2.2. Under what authority did the Commission determine that these acts were permissible after having determined them impermissible prior to July 19, 1940?

A. (1) Section 18 of the Hatch Act. This section had the effect of broadening the scope of permissible political activity by permitting activity which is not connected with a State or national political party.

(2) Section 9(a) of the Hatch Act, as amended by section 12(a) of the Act of July 19, 1940. In an opinion dated January 8, 1941, the Attorney General stated that the Hatch Act permits public expression of opinion on political subjects and candidates provided it does not amount to taking an active part in political management or political campaigns. (40 Op. ATT'Y GEN. 15). By Executive Order 8705, March 5, 1941, the word "privately" was deleted from section 1 of Civil Service Rule I and the Rule was changed to accord with the language of the Hatch Act.

(3) Although there are pre-July 19, 1940 decisions which might be taken to indicate that the holding of a public office was prohibited by civil service rules, such prohibitions were imposed prior to the enactment of the Civil Service Act by Executive Order 9 of January 17, 1873. This Order applied to classified and non-classified employees in the executive branch of government and it and all amendatory orders relating to dual Federal-State office holdings were revoked by Executive Order 11408 on April 25, 1968. The Attorney General has ruled that section 9(a) of the Hatch Act does not apply to holding a State or local office. (39 Op. ATT'Y

GEN. 462; Attorney General's Circular No. 3301, October 26, 1939).

1.3. Is it the position of the Civil Service Commission that the statute requires that each and every act listed in response to question 1.1 be prohibited?

A. No.

1.3.1. If the answer to question 1.3 is "no", then which of these acts are permissible under the current view of the Commission?

A. See answer to interrogatory 1.2.1.

1.3.2. Are there presently certain circumstances which lead the Commission to this judgment, which circumstances did not obtain when said acts were initially prohibited.

A. See answer to interrogatory 1.2.2.

1.3.3. If so, what are these circumstances and why do they compel a reversal of the Commission's original judgment?

A. See answer to interrogatory 1.2.2.

2.7. In the following cases, the Commission indicated that it had searched the pre-July 19, 1940 "determinations" but finding none sufficiently in point rendered in each case decisions favorable to the respondents: *John N. Cawley*, Dkt. No. 1247 (Dec. 29, 1949); *Herbert S. Reed*, Dkt. No. 1204 (Aug. 4, 1947); and *Nell W. Floyd*, Dkt. 1149 (Feb. 7, 1947). Were these determinations based upon a view of the Commission that only specific activities which were determined prior to July 19, 1940 to be prohibited "active participation in political management or political campaigns" can be so determined after July 19, 1940?

A. The decisions in these cases pre-date the tenure of the defendants and their answer is based on their interpretation of the cases. Defendants understand the interrogatory to mean "in order to find a violation in a current case, is it necessary that an exact factual prototype be found among the pre-Hatch Act decisions?" In this context, the answer is *no*.

2.7.1. If so, is this the Commission's view today?

A. Not applicable.

2.8. Is the decision of the Commission in *Archie B. Cole*, File No. 47-3057 (June 8, 1932) a binding determination within the meaning of the Act?

A. No.

2.8.1. What specific act or acts does that determination (Archie B. Cole) prohibit?

A. Public criticism of government policy.

2.8.2. Does the Commission today deem those specific acts to be prohibited by the statute?

A. No.

2.8.3. If the answer to question 2.8 is "no", then by what procedure was the case referred to in question 2.8 overruled?

A. (1) Because of section 18 of the Hatch Act which permitted non-partisan political activity on the part of covered employees, and section 12(a) which permitted public expsession of opinion, the detesmination was not incorporated into the Act.

(2) Although the *Cole* case was referred to the Commission as a political activity violation, the Commission recorded its action in the matter under the heading *"Disloyalty of Archie B. Cole—"* and it appears that the Commission's determination was based upon its finding that Cole's activity in criticizing Government policy made him unsuitable for Federal employment. A copy of Minute 3 of June 8, 1932, it attached hereto as Exhibit B and incorporated herein by reference.

3.0. 5 C.F.R. 733.122 specifically designated thirteen (13) activities as prohibited acts of political management or campaigning. The regulation also points out that the activities prohibited "are not limited to" those listed in the regulation. As used herein the word "regulation" shall refer to 5 C.F.R. 733.122.

3.1. Pursuant to what authority has the Commission promulgated the regulation?

A. (1). 22 Stat. 403, 404 (The Civil Service Act of 1883, pertinent sections codified at 5 U.S.C. 1301 and 5 U.S.C. 3302). These code sections pertain to presidential authority to prescribe rules for the competitive service.

(2). Civil Service Rule 5.1(a) issued pursuant to the presidential rule-making authority. This rule reads:

> "The Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission."

(3). Revised Statutes 1753 (16 Stat. 5.1, 3 March, 1871; last 16 words, codified as 5 U.S.C. 7301), 5 U.S.C. 7301 reads:

> "The President may prescribe regulations for the conduct of employees in the executive branch." Section 601 of Executive Order 11222, May 8, 1965, authorizes the Civil Service Commission to perform the functions vested in the President by 5 U.S.C. 7301 without his prior approval, ratification or other action.

3.4. How can an employee (as defined in question 2.5) determine which activities, other than those specifically enumerated in the regulation, are prohibited?

A. By making an inquiry to his personnel office or the Civil Service Commission.

4.4. List all editions of Pamphlet 20, which have been promulgated by the Commission:

A.

July 1951	August 1957
May 1952	November 1959
May 1953	November 1961
April 1954	March 1963
August 1955	March 1964
January 1956	May 1966

4.9. On page 4 of pamphlet 20 is stated: "section 15 (15 U.S.C.A. 118-1) states that the provisions in the act containing prohibitions against 'taking any active part in political management or in political campaigns' are deemed to include activities prohibited by the civil-service rules." To what rules does this quote refer?

A. The civil service rules prescribed by the President under the authority granted him in the Civil Service Act of 1883.

4.9.1. List all the "civil service rules" that apply to the Commission's interpretation of 5 U.S.C. 7324(a)(2).

A. Section 1 of Rule IV (5 C.F.R. 4.1).

4.9.2. Do these "rules include *all* the acts referred to in question 1.1?

A. No.

4.9.3. If they do not, which of these acts are excluded from the "rules"?

A. The same acts which are listed in answer to interrogatory 1.2.1.

4.9.4. If they do not, by what procedure and authority were the excluded acts so excluded?

A. Under the same authority cited in answer to interrogatory 1.2.2.

4.9.5. In the event that the Commission should find a conflict between the "rules" and the pre-July 19, 1940 determinations, which controls?

A. There can be no conflict between the "rules" and the determinations since the latter are interpretations of the former.

4.9.6. Has the Commission ever found such a conflict?

A. No.

4.9.7. If "yes", state with specificity the factual situation in which the conflict arose.

A. Not applicable.

4.9.8. In the event the Commission finds a conflict between the "rules" and Pamphlet 20 referred to in question 4.1, which controls?

A. See answer to interrogatory 4.9.5.

4.9.9. In the event the Commission finds a conflict between the "rules" and the regulation referred to in question 3.1, which controls?

A. See answer to interrogatory 4.9.5.

4.10. Indicate any and all pre-July 1940 "determinations" by the Commission to the effect that addressing a primary or caucus is impermissibly "active part in political management or in political campaigns". Cite to case name, file number and docket.

A. *Jeff Carpenter,* rural carrier, 1913, 31 AR 146—addressed township caucus and made nominations therein.

Forrest C. Berry, 1932 Min. 368—addressed caucus or convention.

The following cases involve taking an active part in a primary meeting or addressing a party meeting or convention:

John W. Bashford, letter carrier, 1910, 27 AR 122—active part in primary meeting.

H. M. St. Clair, substitute carrier, 1913, 31 AR 150—made a political speech at a meeting held to select members of the county committee of his party.

William L. Baker, rural carrier, 32 AR 143—Nominating a candidate for mayor in a town convention.

Willie O. Zook, rural carrier, 32 AR 143—Nominating candidates for elective office in town caucus.

Horace W. Truesdell, scientific assistant in plant pathology, 1920, 37 AR 107—addressed a meeting to elect delegates to a convention.

14.0. With respect to the affidavit of Anthony L. Mondello,[1] identify with particularity each instance where the defendant Commission or its staff has determined that a "currently accepted constitutional doctrine or other legal doctrines" collided with "a strict interpretation of the Act, the Rule, or past administrative decisions." Identify all such determinations, whether in the context of formal or informal advisory opinions, enforcement action or inaction, or otherwise.

A. In the following cases, falling within the area of *Wilson* v. *United States Civil Service Commission*, it was determined that charges were not warranted under the circumstances of the case:

1. Complaint dated December 16, 1968 (*Beals*). Employees mailed post cards to friends, co-workers and relatives urging them to vote for candidates in a partisan election.
2. Complaint dated November 3, 1971 (*McHugh*). Employee wrote a newspaper article which was critical of a candidate in a partisan election.
3. Complaint dated November 13, 1970 (*Rutledge*). Employee distributed copies of a newspaper editorial endorsing an incumbent Congressman along with the employee's reply supporting the Congressman's opponent.
4. Complaint dated October 30, 1970 (*Neyhart*). Employee wrote two letters to the editor which were laudatory of a candidate in a partisan election.

ANTHONY L. MONDELLO
General Counsel

[Acknowledgment and Certificate of Service Omitted in Printing]

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[1] General Counsel of defendant Commission. Affidavit filed September 1, 1971, in response to an Order of the Court.

UNITED STATES CIVIL SERVICE COMMISSION

POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS

OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

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POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

I. GENERAL PROHIBITIONS

1. Civil-service rule I and the act of August 2, 1939.—Civil-service rule I, section 1, reads as follows:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.

The act of August 2, 1939, provides in part as follows:

It shall be unlawful for any person employed in any administrative position by the United States, or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof), to use his official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the Office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions (sec. 2, Public, No. 252, 76th Cong.).[1]

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the

[1] Penalty for violation of this section is a fine of not more than $1,000 or imprisonment for not more than 1 year, or both (sec. 8, Public, No. 252, 76th Cong., Aug. 2, 1939).

funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person (sec. 9 (a) and (b), Public, No. 252, 76th Cong.).

The rule and the statute quoted above are general prohibitions against participation in politics by officers and employees of the Government. All officers and employees of the Government are, in addition, subject to a number of statutes relating to solicitation of political contributions, political coercion, political discrimination, and the purchase and sale of public office, which are set forth in sections 36 to 59 of this publication.

Every Government employee is expected to be familiar with the statutes and the rule relating to political activity; ignorance does not excuse their violation. Each appointee to the classified service on entering on duty is required to sign a statement that he will familiarize himself with the rule and the laws relating to political activity.

2. **Definition of political activity.**—It is impossible to give a complete list of the particular activities in which an employee may not engage. The prohibition against political activity extends not only to national politics, but also to State, county, and municipal politics and to the activities of any political party by whatever designation it may be known. Any group of persons which opposes another group in matters of governmental principles or policies, or which contends for governmental power, is a political party. Since the scope of governmental activity is constantly changing, a question which is not a political issue at one time may assume a political aspect at another.

The merits of a particular cause or issue are immaterial. If politics is involved, active participation by employees of the Government is prohibited. (See sec. 11.) An employee may participate in a discussion where no political issue is involved or make an address on any moral or ethical subject, but when two or more parties or factions become engaged in a contest for rival or antagonistic measures or policies of governmental control or regulation a political issue is created.

II. APPLICABILITY OF THE RULE AND STATUTE

3. **Classified employees.**—Active participation in politics by employees in the competitive classified service is prohibited by civil-service rule I and also by the act of August 2, 1939, regardless of whether the classified status of such employees was acquired through competitive examination, classification by statute, or classification by Executive order. (See sec. 9.)

4. **Excepted and nonclassified employees.**—Only the first sentence of section 1, civil-service rule I, applies to employees in positions excepted from the competitive classified service. This sentence has been partially enacted in section 2 of the act of August 2, 1939 (see sec. 1 above), and violation of this provision of the statute constitutes a criminal offense.

Under section 9 (a) of the act of August 2, 1939 (see sec. 1 above), all persons employed in the executive branch of the Federal Govern-

ment[3] whether or not such persons are in the competitive classified service are prohibited from using their official authority or influence for the purpose of interfering with an election or affecting the result thereof; and from taking an active part in political management or in political campaigns. The statute, however, expressly reserves to Government employees the right to vote and the right to express their opinions on all political subjects. The effect of this section of the statute, therefore, is to place the same restrictions upon the political activities of all officers and employees of the executive branch of the Government, including Presidential appointees, as section 1 of civil-service rule I places upon the political activities of employees in the classified service, except that employees who are not in the competitive classified service may, according to a statement issued by the Attorney General, express their political opinions publicly, whereas classified employees are confined to a private expression of opinion. In expressing their political opinions publicly, however, nonclassified employees and excepted employees must not take part in an organized political campaign. Except for the manner in which nonclassified employees are permitted to express their political opinions, there is no distinction between employees who are in the classified service and employees who are not in the classified service with respect to the prohibition against political activity.

5. **Temporary employees—employees furloughed or on leave.**—The mere fact that an employee is a temporary or emergency employee or a substitute, or is on furlough or leave of absence, does not exempt him from the statute or the rule. So long as an employee's name is carried on the rolls, restrictions regarding political activity apply to him and he must refrain from their violation, even though he may not be on active duty.[4] It is not permissible for an employee to take leave of absence for the purpose of working for a political committee or organization or of becoming a candidate for an elective office with the understanding that he will resign his classified position if nominated or elected.

6. **Rural carriers.**—An Executive order of December 30, 1911, provides as follows:

> Hereafter paragraphs (*a*) and (*b*) of section 1 of civil-service rule VII shall apply to the appointment of rural carriers, and three eligibles shall be certified by the Civil Service Commission.
>
> In all cases selections shall be made with sole reference to merit and fitness and without regard to political considerations. No inquiry shall be made as to the political or religious opinions or affiliations of any eligible, and no recommendation in any way based thereon shall be received, considered, or filed by any officer concerned in making selections or appointments. Any such recommendation, in writing, forwarded to any such officer shall be at once returned

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[3] Except (a) the President and Vice President of the United States; (b) persons whose compensation is paid from the appropriation for the office of the President; (c) heads and assistant heads of executive departments; (d) officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

[4] An employee who resigns effective at the expiration of his accrued leave may engage in politics after his last day of active service (minute of Commission, Nov. 5, 1938).

to the writer, with attention invited to the purport of this order, and attention hereto shall be similarly directed in connection with any verbal recommendation. Where it is found that there has been a violation of these provisions by any officer concerned in making selections or appointments, such fact shall be cause for the immediate removal of such officer from the service, and the Commission shall make prompt report of any such case for appropriate action to the Postmaster General, or, as to Presidential appointees, to the President. The appointment of the rural carrier concerned, if effected, shall be canceled.

Persons employed as rural carriers, while retaining the right to vote as they please and to express their opinion privately on all political subjects, shall take no active part in political management or in political campaigns. Any rural carrier taking such part shall be removed from the service or otherwise disciplined, recommendation as to the penalty to be imposed in each case to be made by the Civil Service Commission.

NOTE.—Paragraphs (a) and (b) of section 1 of civil-service rule VII refer to the certification and appointment of eligibles.

7. **Substitute rural carriers.**—The restrictions regarding political activity are not applicable to substitute rural carriers, when they are not engaged upon substitute duties, to the same degree as to regular employees. While serving his route, however, a substitute is subject to the same discipline as a regular employee and must refrain from political activity. He must not use his position for political purposes, acting either independently or in collusion with the regular carrier.

8. **Fourth-class postmasters.**—The following is an extract from regulations approved by the President November 25, 1912:

In all cases selection for appointment shall be made with sole reference to merit and fitness and without regard to political or religious considerations. No inquiry shall be made as to the political or religious opinions or affiliations of any applicant or eligible, and in conformity with section 10 of the Civil Service Act no recommendation in any way based thereon shall be received or considered by any officer concerned in making selections or appointments. The attention of the writer of any such recommendation shall be invited to the purport of this order, and attention hereto shall be similarly directed in connection with any verbal recommendation. Where it is found that there has been a violation of these provisions by any officer concerned in making selections or appointments, such fact shall be cause for the immediate removal of such officer from the service, and the Civil Service Commission shall make prompt report of any such case for appropriate action to the Postmaster General, or, as to Presidential appointees, to the President. The appointment of the fourth-class postmaster concerned, if effected, shall be canceled. Persons employed as postmasters of the fourth class, while retaining the right to vote as they please and to express their opinions privately on all political subjects, shall take no active part in political management or in political campaigns. Any such postmaster taking such part shall be removed from the service or otherwise disciplined, recommendations as to the penalty to be imposed in each case to be made by the Civil Service Commission. This section shall apply to all offices of the fourth class of whatever compensation.

9. **Postmasterships at the first-, second-, and third-class offices.**—Postmaster positions at the first-, second-, and third-class offices were included in the competitive classified service by the act of June 25,

1938 (52 Stat. 1076), and the political activities of such postmasters are therefore subject to the same restrictions as those of classified officers and employees.

10. **Retired employees.**—Persons retired from the civil service are not regarded as employees of the Government and are not, therefore, subject to the restrictions of the civil-service rules. Such persons may engage in politics to the same extent as persons not connected with the Government service.

III. PARTICULAR TYPES OF PROHIBITED ACTIVITIES

11. As has been pointed out, it is impossible to make a complete enumeration of all the particular types of political activities in which Government employees may not engage. The general scope of the political-activity rule has been defined in section 2 above. In the following sections some of the types of political activity which occur more frequently are discussed in detail.

12. **Activity by indirection.**—Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her own behalf. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what their husbands may not secure for themselves. In such situations, it is obvious that the prohibitions against political activity are being indirectly violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

13. **Conventions.**—Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference. (See secs. 4 and 19.)

14. **Primaries—caucuses.**—An employee may attend a primary meeting, mass convention, beat convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass

this point in participating in its deliberations. He may not act as an officer of the meeting, convention, or caucus, may not address it, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

15. **Committees.**—Service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a political committee to which the general public is admitted, but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics, but which, when considered as a part of the whole purpose, assume an active political character. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

16. **Clubs and organizations.**—Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club, or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances. (See secs. 4 and 19.)

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Section 9A of the act of August 2, 1939 (Public, No. 252, 76th Cong.), provides as follows:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the

funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

17. **Contributions.**—An employee may make political contributions to any committee, organization, or person not employed by the United States, but may not solicit, collect, receive, or otherwise handle or disburse the contributions. (See provisions of the Criminal Code, discussed in secs. 36 to 50.)

18. **Meetings.**—Service in preparing for, organizing, or conducting a political meeting or rally, addressing such a meeting, or taking any part therein, except as a spectator, is prohibited.

19. **Expression of opinions.**—Although section 9 (a) of the act of August 2, 1939, reserves to Federal officers and employees the right to express their opinions on all political subjects, officers and employees in the competitive classified service are subject also to section 1 of civil-service rule I, under which such employees must confine themselves to a *private* expression of opinion. Nonclassified and excepted employees may not indulge in such public expression of opinion as constitutes taking part in an organized political campaign. (See foregoing secs. 1 and 4.)

20. **Activity at the polls and for candidates.**—An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a national character. It is also a criminal offense to promise any employment, position, work or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party. (See secs. 48 and 50 herein.)

It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, assisting in counting the vote, or engaging in any other activity at the polls except the marking and depositing of his own ballot. Rendering service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of political activities prohibited by the rule, even if such service is performed without regard to political party.

21. **Election officers.**—Service as judge of election, inspector, checker, teller, or as election officer of any kind is prohibited.

22. **Newspapers—publication of letters or articles.**—A classified employee may not publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use. (See secs. 4 and 19.)

23. **Liquor question.**—Activity in campaigns concerning the regulation or suppression of the liquor traffic is prohibited. An employee may be a member but not an officer of a club, league, or other organization which takes part in such a campaign. The dissemination of temperance propaganda is permissible, but any endeavor for or against the regulation, control, or suppression of the liquor traffic through political agencies is prohibited.

24. **Betting or wagering on elections.**—Betting or wagering upon the results of primary and general elections is penalized by the laws of most States and is improper political activity.

25. **Activity in civic organizations and citizens' associations.**—Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, or civil-service rule I, provided such activities have no connection with the campaigns of particular candidates or parties.

26. **Parades.**—An employee may not march in a political parade, organize, or be an officer or leader of such a parade.

A Government employee may not take part in the activities of a musical organization in any parade or other activity of a political party.

27. **Signing petitions.**—The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or Member thereof, shall not be denied or interfered with."

The right guaranteed by the Constitution and the statute extends only to petitions addressed to the Government, or to Congress or Members thereof. It does not extend to petitions addressed to State, county, or municipal governments, or to other political units. A classified employee is permitted to sign petitions of the latter class *as an individual*, without reference to his connection with the Government, but he may not initiate them, circulate them, or canvass for the signatures of others.

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[4] Appointment is made by the President by and with the advice and consent of the Senate to postmaster positions of the first, second, and third classes, but these positions are in the competitive classified service under the act of June 25, 1938.

28. **Applying for Presidential positions not in the classified service.**[1]—When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service there is no objection to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters, and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend another person for such an appointment; but he may not circulate a petition or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

When an unofficial primary or election is held for the purpose of determining the popular choice for the Presidential office, a classified employee may permit his name to appear upon the ticket, but he may not solicit votes in his behalf at such a primary or election, or in any manner violate section 1 of rule I. He may vote and express privately his opinions, but may not solicit votes or publicly advocate the candidacy or election of himself or any other person. Although it is permissible for a classified employee, *as an individual*, to sign a petition or recommend another person for appointment to a nonclassified position, he is not permitted to sign such a petition as a Government employee or in any other way to use his official authority or influence to advance the candidacy of any person for election or appointment to any office. Classified employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for any office, but they may not do so as Government employees or as a group or association of Government employees.

29. **Other forms of political activity.**—Among other forms of political activity which are prohibited are the distribution of campaign literature, badges or buttons, and assuming general political leadership or becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office.

IV. CANDIDACY FOR OR HOLDING LOCAL OFFICE—CLASSIFIED AND NONCLASSIFIED EMPLOYEES

30. **Candidacy for local office.**—Candidacy for a nomination or for election to any national, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy. The fact that candidacy is merely passive is immaterial; if an employee acquiesces in the efforts of friends in furtherance of

[1] See footnote on opposite page.

such candidacy such acquiescence constitutes an infraction of the prohibitions against political activity.

31. **Federal employees holding local office.**[5]—Persons holding Federal civil office by appointment, whether in the competitive classified service or not, are prohibited from accepting or holding any office under a State, Territorial, or municipal government by an Executive order of January 17, 1873, which is as follows:

Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such Federal officer of his commission or appointment in the service of the United States.

The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also excepted from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters.[6] Heads of departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively.[7]

[5] See sec. 35.

[6] See sec. 8.

[7] A Federal employee who resigns at the expiration of his accrued leave may accept a State or municipal position after his last day of active Federal service (16 Comp. Gen. 776, Feb. 19, 1937).

32. Interpretation of the order of January 17, 1873.—An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested that there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges[*] are not regarded as "offices" within the contemplation of the Executive order, but as employments or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus, in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government or from any department, whether for a fixed time or at the

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[*] Includes assistant professorships in a State college, assistant lectureships in an evening school of a municipal university, instructorships in a State college, and similar positions in State and municipal colleges and universities (minute of Commission, August 7, 1937).

pleasure of the appointing power, are embraced within the operation of the order.

33. **Eligibles holding local office.**—Eligibles who are holding a local office not excepted from the prohibitions of the order of January 17, 1873, on selection for and acceptance of any position in the competitive classified service or of unclassified laborer must immediately resign the local office. Such resignation must be effected whether the service in the local office is compensated or uncompensated or whether the employee is on active duty or leave without pay. The holding of a local office not excepted from the prohibitions of the order of January 17, 1873, is an absolute disqualification for appointment, and unless persons otherwise eligible for appointment are willing immediately to resign the local office in the event of selection for appointment, their appointments cannot be approved.

34. **Minor local offices which may be held by Government officers and employees.**—Although the Executive orders of January 17 and January 28, 1873, prohibit generally any person holding Federal civil office by appointment, from accepting or holding an office under a State, Territorial, or municipal government, certain offices of a minor character are excepted from this general prohibition. Among these are positions of justice of the peace; notary public; commissioner to take acknowledgment of deeds, of bail, or to administer oaths; positions on boards of education, school committees, public libraries, and in religious or eleemosynary institutions. In addition, Federal employees are, under certain conditions, permitted to hold other local offices under authority of the Executive orders set forth in section 35. The permission to hold local offices granted by these Executive orders, however, is now subject to the general prohibition of section 9 of the act of August 2, 1939 (see sec. 1), against participation in political management and in political campaigns by Federal employees.

In view of the broad language of section 9 of the act of August 2, 1939, the incumbency by a Federal employee of any *elective* office whatever under a State, Territorial, or municipal government is prohibited, regardless of whether or not the office is of such character that its incumbency was permitted by Executive order prior to the enactment of the act. The incumbency by a Federal employee of an appointive office under a State, Territorial, or municipal government is permissible, provided such incumbency is specifically authorized by some statute or Executive order. In securing such offices, however, and in the discharge of the duties thereof, Federal employees must not engage in political management.

35. **Special exceptions to the order of January 17, 1873.**—The following Executive orders contain special exceptions to the general prohibition of the Executive orders of January 17 and January 28, 1873. The authority conferred by these orders is now subject to the general restriction contained in the act of August 2, 1939, against participation in political management and in political campaigns. (See sec. 34, above.)

Employees on Indian reservations may be appointed under State authority as deputy sheriffs or constables, as the requirements of the

service demand. The reason for this action is that on all reservations which have been allotted and opened for settlement conditions arise wherein the Federal Government has sole jurisdiction over certain offenses and the State has jurisdiction over other offenses, and if the joint authority of a Federal and State officer can be merged in one person, a serious difficulty in the administration of justice is removed.

There is no objection to the holding of a low-salaried position in a municipal fire department.

Under Executive orders certain other exceptions have been made, as indicated below:

Employees of the Department of Agriculture.—Officers and employees of the Department of Agriculture are authorized to hold State and Territorial positions when such action is deemed necessary by the Secretary of Agriculture to secure a more efficient administration (Executive order of June 20, 1907).

Collectors of cotton statistics, Bureau of the Census.—State and county officials may be appointed special agents under the Bureau of the Census for the collection of cotton statistics (Executive order of August 4, 1909).

Moderators of town meetings.—The temporary office of moderator of a town meeting and offices of a like character are excepted from the operation of the order of January 17, 1873 (Executive order of August 24, 1912).

Employees of the Reclamation Service and the National Park Service.—Employees of the Reclamation Service and the National Park Service may, with the approval of the Secretary of the Interior, accept appointments as deputy State fish or game wardens, if no compensation is attached to the position (Executive order of July 9, 1914).

Lighthouse Service—Laborers.—Laborers in charge of lights in the Lighthouse Service are excepted from the operation of the order of January 17, 1873 (Executive order of October 6, 1915).*

Special agents, Department of Labor.—Persons holding State, Territorial, or municipal positions may be appointed as special agents when such action is deemed necessary by the Secretary of Labor to secure a more efficient administration of any law coming within the purview of the Department of Labor (Executive order of January 2, 1923).

Employees of the Veterans' Administration.—Officers and employees of the United States Veterans' Administration serving in a medical capacity and on a part-time basis may with the consent of the Administrator hold State, county, or municipal positions in which employed in a medical capacity. Officers and employees of the United States Veterans' Administration may with the consent of the Administrator accept appointments under State, county, or municipal authority as deputy sheriffs (Executive order of August 6, 1924).

Employees of the Alaska Railroad.—Employees of the Alaska Railroad, permanently residing in municipalities on the line of the railroad, are permitted to become candidates for and hold municipal office therein (Executive order of October 22, 1926).

Appointments in the Department of Commerce.—Persons holding State, Territorial, or municipal positions may receive, unless prohibited by law, appointments under the Department of Commerce when the Secretary of that Department deems such employment necessary to secure more efficient administration of the duties of his department (Executive order of July 3, 1931).

Officers of the Public Health Service.—Officers of the Public Health Service are permitted, upon recommendation of the Surgeon General of the Public Health Service, and the approval of the Secretary of the Treasury, to hold office in State, Territorial, or local health organizations, in order to cooperate with and aid State, Territorial, or local health departments; and State, Territorial, or local health officials or employees are permitted, unless prohibited by law, to hold office in the Public Health Service when the Surgeon General and the Secretary of the Treasury deem such employment necessary to secure a more efficient administration of the duties imposed upon the Public Health Service (Executive order of August 31, 1931).

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*The Lighthouse Service has been consolidated with the Coast Guard, Treasury Department.

Offices under municipalities of the Virgin Islands.—Membership in the Colonial Council of the Municipality of St. Thomas and St. John, or in the Colonial Council of the Municipality of St. Croix, Virgin Islands, being unremunerative positions, shall not be deemed disqualification for employment in the Federal service of the Virgin Islands, notwithstanding the Executive order of January 17, 1873, provided it does not interfere with the efficient discharge of the duties of the Federal position, of which the head of the department under which the position is held will be the judge (Executive order of February 27, 1933).

Employees of the National Park Service.—Employees of the National Park Service are permitted, with the approval of the Secretary of the Interior, to accept appointments as deputy sheriffs under the laws of the States or Territories in which such employees may be on duty: *Provided*, That their services as such deputy sheriffs shall be without compensation and shall not in any manner interfere or conflict with the performance of their duties as employees of the National Park Service (Executive order of April 3, 1936).

Medical officers, Indian Service.—Officers and employees of the Indian Service, Department of the Interior, serving in a medical or sanitary capacity, either on a part-time or full-time basis, may hold, with the consent of the Secretary of the Interior, State, county, or municipal positions of a similar character: *Provided*, That such services shall not in any manner interfere or conflict with the performance of their duties as officers or employees of the Indian Service: *And provided further*, That there shall be no additional compensation when the Federal officer or employee is carried on a full-time basis (Executive order of May 13, 1936).

District advisers in the Interior Department under the act of June 28, 1934.—State, county, or municipal officers, when duly elected by qualified voters of a grazing district, may be appointed by the Secretary of the Interior to serve as district adviser under the act of June 28, 1934 (48 Stat. 1269), as amended by the act of July 14, 1939 (Public, No. 173, 76th Cong.), for intermittent duty, when the Secretary of the Interior deems such services necessary in the interest of grazing on public lands (Executive order of June 17, 1937).

Immigration inspector, Department of Labor, Virgin Islands.—Officers and employees of the Municipalities of St. Thomas and St. John or of the Municipality of St. Croix, Virgin Islands, may be appointed to the position of immigration inspector for the Virgin Islands (Executive order of November 6, 1937).

Employees of the Interior Department.—Officers and employees of the Interior Department, upon approval of the Secretary of the Interior, may hold office under State, Territorial, and municipal governments engaged in cooperative and related work with the Department, provided that the services to be performed pertain to such work and do not interfere with the performance of the Federal duties. State, Territorial, and municipal employees engaged in cooperative and related work with the Interior Department may be appointed in the Department of the Interior when the Secretary deems such employment necessary to secure more efficient administration of said work. Appointments of such officers and employees to positions subject to the civil-service laws must be made in accordance with such laws (Executive order of January 21, 1938).

Employees of the United States Marshal for the Virgin Islands.—Any officer or employee of the police or prison departments of the Territorial and municipal governments of the Virgin Islands may be appointed to the position of deputy or any other position in the office of the United States Marshal for the Virgin Islands (Executive order of May 24, 1938).

Employees of the Division of Grazing, Department of the Interior.—Employees of the Division of Grazing of the Department of the Interior, with

the approval of the Secretary, may accept appointment as deputy fire warden, deputy fish warden, or deputy game warden under the States in which such employees may be on duty, provided that their services in the State position are without compensation and do not interfere with the performance of the duties of the Federal position (Executive order of August 4, 1938).

Utilization of services of State and local officers.—The heads of a number of Federal agencies are authorized by specific statutes to employ the services of State and local officers.

Employees residing in municipalities near the District of Columbia.—Special permission has been granted to employees residing in municipalities near the District of Columbia to hold local municipal office by the Executive order of February 14, 1912, which is quoted in the paragraphs below. The scope of this permission has been restricted by the act of August 2, 1939, which prohibits participation in political management or political campaigns. The permission granted by the Executive order of February 14, 1912, must therefore be exercised subject to the provisions of the act of August 2, 1939. (See sec. 34 above.)

Employees of the executive civil service permanently residing in the following incorporated municipalities adjacent to the District of Columbia will not be prohibited from becoming candidates for or holding municipal office in such corporations:

In Maryland—Takoma Park,[88] Kensington, Garrett Park, Chevy Chase, Glen Echo, Hyattsville, Mount Rainier, Somerset,[89] North Beach,[90] Capitol Heights,[91] Laurel,[92] Riverdale,[93] Bladensburg,[94] Brentwood,[95] Berwyn Heights,[96] Cottage City,[97] North Brentwood,[98] Edmonston,[99] Colmar Manor,[100] Fairmount Heights,[101] Eagle Harbor,[102] Cobb Island,[103] Seat Pleasant,[104] Cheverly,[105] District Heights,[106] Greenbelt.[107]

In Virginia—Clifton Station,[108] Falls Church, Vienna, Herndon, Potomac.[109]

In the exercise of the privilege granted by this order, officers and employees must not neglect their official duties and must not engage in national, State, or county political activity in violation of the civil-service rules, and if there is such violation the head of the department or independent office in which the person is employed shall inflict such punishment as the Civil Service Commission shall recommend.

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[88] Executive order, May 5, 1914.
[89] Executive order, May 26, 1914.
[90] Executive order, February 23, 1916.
[91] Executive order, March 9, 1918.
[92] Executive order, November 25, 1920.
[93] Executive order, April 29, 1922.
[94] Executive order, June 7, 1923.
[95] Executive order, May 19, 1924.
[96] Executive order, July 12, 1924.
[97] Minute of the Commission, July 18, 1924.
[98] Minute of the Commission, September 2, 1924.
[99] Minute of the Commission, June 6, 1927.
[100] Minute of the Commission, June 15, 1927.
[101] Minute of the Commission, August 6, 1929.
[102] Minute of the Commission, May 29, 1930.
[103] Minute of the Commission, July 17, 1931.
[104] Minute of the Commission, April 24, 1931.
[105] Minute of the Commission, May 18, 1936.
[106] Minute of the Commission, November 29, 1937.
[107] Minute of the Commission, December 21, 1937.
[108] As amended by Executive order, December 24, 1921. Potomac, Va., has been annexed to the city of Alexandria, Va., and the authority granted by the order is revoked.

The Civil Service Commission may extend the privilege of this order to other incorporated municipalities in Maryland and Virginia when it shall deem it necessary to the domestic interests of the Government employees resident therein." (Executive order of February 14, 1912, as amended.)

NOTE.—The exception made in this case to section 1 of rule I and the Executive order of January 17, 1873, does not extend to municipalities other than those specifically named.

Employees of navy yards, arsenals, and military establishments.—Special permission has been granted to employees of navy yards, arsenals, and military establishments to hold local and municipal office by the Executive order of May 14, 1909, as amended by Executive order of August 27, 1919, which is quoted in the following paragraph. The scope of this permission has been restricted by the act of August 2, 1939, which prohibits participation in political management or political campaigns. The permission granted by the Executive orders must therefore be exercised subject to the provisions of the act of August 2, 1939. (See section 34 above.)

Whenever in the opinion of the Secretary of the Navy or the Secretary of War a strict enforcement of the provisions of section 1, rule I, of the civil-service rules would influence the result of a local election the issue of which materially affects the local welfare of the Government employees in the vicinity of any navy yard or station or of any arsenal or other military establishment, the Civil Service Commission may, on recommendation of the Secretary of the Navy or the Secretary of War, and after such investigation as it may deem necessary, permit the active participation [8] of the employees of the yard, station, arsenal, or other military establishment in such local election. In the exercise of the privilege which may be conferred hereunder, persons affected must not neglect their official duties nor cause public scandal by their activity (Executive order of May 14, 1909, as amended by Executive order of August 27, 1919).

NOTE.—It is not the practice of the War and Navy Departments to recommend, or of the Commission to grant, under this order permission to bosses or head men, by whatever designation known, or to any person whose recommendations have, by regulation, any influence upon the employment, promotion, laying off, or discharge of other employees, to hold local office. Prior permission must be obtained to hold local office under the order. The order applies solely to local municipal offices. The order does not apply to localities where the proportion of Government employees to the total population is negligible.

Employees residing in Arlington County, Va.—Special permission has been granted to employees residing in Arlington County, Va., to hold local municipal office by the Executive order of May 20, 1931, which is quoted in the following paragraph. The scope of this permission has been restricted by the act of August 2, 1939, which prohibits participation in political management or political campaigns. The permission granted by the Executive order of May 20, 1931, must therefore be exercised subject to the provisions of the act of August 2, 1939. (See sec. 34 above.)

Officers and employees of the executive civil service permanently residing in Arlington County, Va., may become candidates for [8] and hold local office in such county and may participate in campaigns for election to such offices."

In the exercise of the privilege granted by this order, officers and employees must not neglect their official duties and must not engage in National or State

[8] Executive order, July 12, 1924.

[8] Participation in political management and in political campaigns is now prohibited by the act of August 2, 1939. (See sec. 34, above.)

politics in violation of the civil-service rules." If there is such violation, the head of the department or independent office in which the person is employed shall inflict such punishment as the Civil Service Commission shall recommend.

Officers and employees elected" or appointed to offices requiring full-time service shall resign their positions with the Federal Government. If elected" or appointed to offices requiring only part-time service, they may accept and hold same without relinquishing their Federal employment, provided the holding of such part-time office does not conflict or interfere with their official duties as officers or employees of the Federal Government.

This order is based upon the facts that Arlington County is substantially a municipality, that a considerable number of the residents and taxpayers are employed in the Government service, that service as local officers in such county should in no way involve general partisan political activity" and that the principle of home rule and local self-government justifies such participation.

The permission granted by this order may be suspended or withdrawn by the Civil Service Commission when, in its opinion, the activities resulting therefrom are, or may become, detrimental to the public interest or inimical to the proper enforcement of the civil-service rules (Executive order of May 20, 1931).

V. STATUTES RELATING TO POLITICAL ASSESSMENTS, POLITICAL COERCION AND DISCRIMINATION, AND THE PURCHASE AND SALE OF PUBLIC OFFICE

86. In addition to the restrictions of the act of August 2, 1939, civil-service rules, Executive orders, and departmental regulations, the freedom of officers and employees of the executive civil service to engage in politics is limited further by a number of statutes. These statutes are generally applicable to all officers and employees of the United States, whether or not in the classified service, and, in some cases, the language of the statute is sufficiently broad to include any person receiving compensation for services from money derived from the Treasury of the United States, and other persons. These statutes are set forth in the following sections. Some of the activities prohibited under penalty of fine and imprisonment are:

1. Solicitation or receipt of political contributions by one officer or employee from another.
2. The giving or handing over of a political contribution by one employee to another.
3. Solicitation or receipt of political contributions in a Federal building by any person, whether or not an employee of the Government.
4. Solicitation or receipt by any person of political contributions from any person receiving any benefit under any act of Congress appropriating funds for relief.
5. Solicitation or receipt of any thing of value, either for personal reward or as a political contribution, in return for the promise to use, or the use of, influence to secure an appointive office under the United States.
6. Payment or the offer of payment for the use of influence in securing an appointive office under the United States.

" Participation in political management and in political campaigns is now prohibited by the act of August 2, 1939. (See sec. 84, above.)

7. Promising employment, compensation, or other benefit made possible by act of Congress as consideration or reward for political activity.

8. Discrimination by an officer or employee in favor of, or against, another officer or employee on account of political contributions.

9. Depriving any person on account of race, creed, color, or political activity, of compensation or other benefit made possible by any act of Congress appropriating funds for relief.

10. Disclosure for political purposes of any list or names of persons receiving benefits under an act of Congress appropriating funds for relief and the receipt of such a list for political purposes.

VI. POLITICAL ASSESSMENTS

37. Solicitation or receipt of political contributions from Federal employees.—The United States Code, title 18, section 208 (Criminal Code, sec. 118, as amended), provides as follows:

> It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 5 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads as follows:

> It shall be unlawful for any person to solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any person known by him to be entitled to or receiving compensation, employment, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes.[a]

38. Circulars of solicitation bearing names of Federal employees.—In an opinion of October 17, 1902 (24 Op., 133), the Attorney General held that the sending of a circular letter by a political committee to Federal officers and employees soliciting financial aid for Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service Act (now sec. 118 of the Criminal Code), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States. The statute unquestionably condemns all such circulars, notwithstanding the particular form of words adopted, in order to show a request rather than a demand, and to give the responses a quasi-voluntary character.

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[a] Under section 8 of the act penalty for violation of this section is fine of not more than $5,000, imprisonment for not more than 1 year, or both.

89. "Political assessments" defined.—The following is an extract from the decision in *United States* v. *Scott* (74 Fed., 213), in the Circuit Court of the District of Kentucky, rendered October 7, 1895, by Taft, J.:

To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution. * * * Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States.

The following extract is from the decision rendered by McCall, J., in the case of *United States* v. *Dutro*, *L. W.*, 1913, Western District of Tennessee (unreported):

The statute under which the indictment was found prohibits (and I shall speak of this concrete case) the postmaster at Memphis, Tenn., from receiving, or being in any manner concerned in receiving, any assessment, subscription, or contribution for any political purpose whatever from any official, clerk, or employee of the United States.

There are four counts in the indictment. Two of them charge the defendant with receiving subscriptions and contributions for political purposes from an officer, clerk, or employee of the United States, and two of them charge defendant with being concerned in receiving such assessment or subscription for political purposes from a clerk or employee of the United States.

Evidently one of the purposes of Congress in enacting the legislation was to prohibit superior officers from bringing pressure to bear upon their subordinates in order to secure contributions for campaign purposes, and the act is couched in very broad terms.

This evidence (which so far is uncontradicted) shows that the defendant, Mr. Dutro, did receive two contributions for campaign purposes from an officer or clerk or employee of the United States. Whatever may have been Mr. Dutro's frame of mind in regard to his connection with it, the one fact remains, as the evidence shows, that he received these contributions for the purposes and from the parties which the law prohibits. Perhaps and no doubt he did so without any thought that he was violating any statute, and felt that he was acting purely as a conveyor of these contributions to the political parties for whom they were intended, to accommodate those who were making the contributions, and purely as a personal matter, but I think under the evidence his action was in violation of the statute.

The other two counts, as I have pointed out, charge the defendant with being concerned in receiving assessments, subscriptions, or contributions for campaign purposes from a clerk, employee, or officer of the United States. There is a controversy here between counsel as to what the word "concerned" means. From what the law books say which have been read here, and from my own impression, it seems that the word "concerned" means to be interested in, or take part in, receiving such contributions. If Mr. Dutro, by his connection with these two subscriptions, took a part in the contributions being made by em-

ployees of the Government for campaign purposes, he would be guilty. I think the natural construction of the phrase or term or word necessarily leads to the conclusion that he did take a part in receiving the contributions, because he received and conveyed them from the contributors to the parties for whom they were intended, and, as the proof so far shows, he knew that the parties who were making the contributions were clerks under him in the Post Office Department, and he knew the purpose for which the money was to be used and where it was to go.

The foregoing case definitely establishes the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of the statute.

40. **Solicitation or receipt of political contribution in Federal buildings.**—The United States Code, title 18, section 209 (Criminal Code, sec. 119), provides that—

No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208 of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

41. **Letters addressed to Federal buildings.**—The Commission by a minute of March 23, 1897, held that addressing a letter to a Government employee in a Government building soliciting political contributions is a solicitation in that building within the meaning of section 12 of the Civil Service Act, but notwithstanding numerous violations no opportunity arose of having the question judicially determined until 1907, when an indictment was obtained against Edward S. Thayer at Dallas, Texas. A demurrer to the indictment was sustained on the ground that the act required the personal presence in the Government building of the solicitor. Appeal was taken to the Supreme Court, and the judgment of the lower court was reversed. (*United States* v. *Thayer*, 209 U. S. 39.) The opinion of the Court, delivered by Justice Holmes on March 9, 1908, establishes definitely the proposition that solicitation by letter or circular addressed to and delivered by mail or otherwise to an officer or employee of the United States at the office or building in which he is employed in the discharge of his official duties is a solicitation "in a room or building" within the meaning of this section, the solicitation taking place where the letter was received. (See also *United States* v. *Smith*, 163 Fed., 926, where the letter was personally delivered.)

42. **Letters delivered in Federal buildings.**—The Commission holds that the sending through the mails of letters to Government employees soliciting political contributions, their street or home address being omitted from the envelopes, with the result that the letters are delivered by the postal authorities in the Government building in which they are employed, constitutes a violation of this section. It is a maxim of the law that a person is presumed to intend the natural and probable consequences of his acts, and failure or omission to take measures to avoid delivery of such letters in a Government building will render the offender liable to prosecution.

43. **Discrimination on account of political contributions.**—The United States Code, title 18, section 210 (Criminal Code, sec. 120), provides as follows:

No officer or employee of the United States mentioned in section 206 of this title shall discharge or promote or degrade or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

(See also sec. 52 herein.)

44. **Payment of political contributions by one employee to another.**—The United States Code, title 18, section 211 (Criminal Code, sec. 121), provides as follows:

No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

45. **Penalties for assessments.**—The United States Code, title 18, section 212 (Criminal Code, sec. 122), provides that—

Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000 or imprisoned not more than 3 years, or both.

46. **Foregoing offenses declared felonies.**—By section 15 of the Civil Service Act it was declared that persons violating any provisions of the four preceding sections should be guilty of a misdemeanor, but this section is now superseded by section 122 of the Criminal Code, above quoted, which makes such violation a felony in view of the following provision of section 335 of the Criminal Code (U. S. C., title 18, sec. 541):

All offenses which may be punished by death or imprisonment for a term exceeding 1 year shall be deemed felonies. All other offenses shall be deemed misdemeanors.

VII. PURCHASE AND SALE OF PUBLIC OFFICE

47. **Payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 149, provides as follows:

It shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever.

48. **Receiving payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 150, provides as follows:

It shall be unlawful to solicit or receive from anyone, whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying

the money, or any other person, in obtaining any appointive office under the Government of the United States.

49. **Punishment for violation.**—The United States Code, title 18, section 151, provides:

> Anyone convicted of violating sections 149 and 150 of this title shall be punished by imprisonment of not more than 1 year, or by a fine of not more than $1,000, or by both such fine and imprisonment.

50. **Promising benefits for political activity.**—Section 3 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads:

> It shall be unlawful for any person, directly or indirectly to promise any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any act of Congress, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.[*]

VIII. POLITICAL COERCION

51. Section 2, clause second, of the Civil Service Act directs that the civil-service rules "shall provide and declare as nearly as the conditions of good administration will warrant, as follows: * * * Sixth. That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." In pursuance of this section, civil-service rule I, section 1, provides, in part, that "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." This provision applies to all persons in the executive civil service, nonclassified as well as classified, and is held to prohibit a superior officer from requesting or requiring the rendition of any political service or the performance of political work of any sort by subordinates.

Section 1 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads as follows:

> That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions.[*]

Section 7 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads:

> No part of any appropriation made by any act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any such act upon any

[*] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

person shall be exercised or administered for the purpose of, interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.[54]

IX. POLITICAL DISCRIMINATION

52. Failure to contribute or render political service not prejudicial.—Section 2, clause second, of the Civil Service Act reads:

Fifth. That no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Section 4 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads as follows:

It shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election.[54]

53. No disclosure as to opinions or affiliations.—Section 2 of rule I provides as follows:

No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of his political or religious opinions or affiliations.

(See sec. 16 herein.)

54. Definition of discrimination.—Political discrimination consists in giving appointment, promotion, or any other favor to an appointee, eligible, or candidate because of his politics, or withholding appointment, promotion, or any other favor from an appointee, eligible, or candidate because of his politics. An appointing officer who appoints or refuses to appoint an applicant because the applicant does or does not entertain certain political opinions, who makes any inquiry of the applicant or any other person as to the applicant's political opinions or affiliations, or reduces an employee because that employee refuses to render political service, to be coerced in political action, or to contribute money for political purposes, or who advances or promotes an employee for opposite reasons, violates the Civil Service Act and rules.

X. POLITICAL RECOMMENDATION

55. Senators and Representatives.—Section 10 of the Civil Service Act provides:

That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or Member

[54] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

56. **Disclosing politics.**—Rule I, section 3, provides as follows:

No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission * * * or by any officer concerned in making appointments or promotions.

57. **Letters disclosing politics not to be considered.**—It is the duty of officers concerned in making appointments or promotions to refuse to receive or consider letters disclosing the politics or religion of an applicant, eligible, or employee and to explain to the writers that communications based upon such grounds will not receive attention or be filed.

58. **Recommendation for promotion.**—Rule XI, section 3, provides that—

No recommendation for promotion except in the regular form of periodical service-rating reports or unless it be made by the person or persons under whose supervision such employee has served shall be considered by any officer concerned in making promotions. Recommendation in any other form or by any other person, if made with the knowledge and consent of the employee, shall be sufficient cause for debarring him from the promotion proposed, and a repetition of the offense shall be sufficient cause for removing him from the service.

59. **Disclosure of names for political purposes.**—Section 6 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads:

It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes.[*]

XI. JURISDICTION OF COMMISSION

60. **Withholding salary of employees engaged in political activity.**—Civil-service rule XV reads as follows:

For the proper supervision and enforcement of its functions, the Commission shall, if it finds that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or of the rules promulgated in accordance therewith, or in violation of any Executive order or any regulations of the Commission, or that any employee subject to such act, rules, orders, or regulations is taking active part in political management or political campaigns, after notice to the person affected and opportunity for explanation, certify the facts to the proper appointing officer with specific recommendation for discipline

[*] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

or dismissal; and such appointing officer shall carry out the recommendation. In the event of any continued violation for 10 days after such recommendation, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall not pay or allow the salary or wages of such person thereafter accruing.

61. **Commission's determinations final.**—The General Accounting Office is without jurisdiction to review the determinations of the Civil Service Commission under rule XV (see above) and, upon certification by the Commission that an employee is holding a position in violation of the Civil Service Act and rules, the General Accounting Office has no alternative to withholding credit for payments made for salary or compensation (decision, Comptroller General, July 20, 1939, to the Postmaster General).

U. S. GOVERNMENT PRINTING OFFICE: 1939

[Title Omitted in Printing]

AFFIDAVIT

Roger W. Jones, now residing at 3912 Leland Street, Chevy Chase, Maryland, first being duly sworn deposes and says:

1. I am a retired annuitant of the Federal Government under the Civil Service Retirement Act. I was educated at Cornell and Columbia Universities. Much of my career in government service has been in the area of personnel management and administration. I entered the civilian service in 1933 and, except for the period 1942-1945 when I was on active duty as a reserve officer of the Army, I held various career and non-career posts until retirement in October 1968. Among these posts were three in the Bureau of the Budget—those of Assistant Director for Legislative Reference (civil service), 1949-1957; Assistant Director (statutory), 1957-1958); Deputy Director (Presidential), 1958-1959). In all three of these positions a substantial part of my time was spent in dealing with policy issues concerning the Federal civilian work force including all personnel legislation, Executive Orders prescribing rules and regulations, and matters relevant to the slowly emerging Federal concern with labor-management relations. Thereafter I served as Chairman, U.S. Civil Service Commission (Presidential), 1959-1961 which has among other duties administration of the laws and regulations on political activity of Federal employees; Deputy Under Secretary of State for Administration (Presidential), 1961-1962, the top personnel position in the Department; and Senior Consultant and Special Assistant to the Director, Bureau of the Budget, 1962-1968. As indicated above, all of these assignments have involved experience with administrative and legislative issues related to the Hatch Act. In 1967, I was appointed by President Johnson as a member of the Commission on Political Activity of Government Personnel, which was established pursuant to P.L. 89-617. The assignment of the Commission was to investigate and study Federal laws which limit or discourage the participation of Federal or State officers and employees in political activity. During the period March 1969-May 1971, I was recalled from retirement to full-time service as an Assistant Director of the Bureau of the Budget and its successor (after July 1,

1970) the Office of Management and Budget. In this assignment my responsibilities were in the fields of personnel policy and labor-management relations. They involved review, once again, of various proposals to amend the Hatch Act.

2. In the course of my experience as a Federal officer primarily concerned with management, personnel procedures, and administration of Federal employees, I have been responsible for developing personnel policies and procedures and for evaluating and criticizing such plans and policies developed by others. An important part of my duties in the foregoing jobs was the evaluation of: (a) effectiveness of groups of Federal employees; (b) procedures and prohibitions which should be instituted or modified in order to maintain and improve employee effectiveness and organization and (c) proposed policies and procedures, which if instituted, would affect—either favorably or adversely—the functioning of Federal employees. My duties have required such judgments in a wide range of contexts, not simply those relating to employees to whom the Hatch Act applies.

3. As Chairman of the Civil Service Commission, I shared with my two colleagues responsibility for administering the Hatch Act and had many opportunities to observe its impact upon covered employees and on the Federal service as a whole. More recently, as a member of the Commission of Political Activity of Government Personnel I had renewed opportunity to become familiar with the provisions of the Hatch Act proscribing "taking any active part in political management or in political campaigns." These duties also required me once again to consider the implications of the great number of prior Civil Service Commission rulings relating to political management and campaigning.

4. In my opinion, based upon my experience above described, there are four major categories of political activity which, if engaged in by Government employees, would impair the effectiveness and impartiality of the Civil Service:

(1) Running for national office (President, Vice President, Senator, Representative or elector);

(2) Soliciting funds from federal employees, coercion or any other partisan pressure exerted on employees;

(3) Serving as an officer, paid or unpaid, of any national or state political party; or serving as ward or precinct officer as those positions normally are conducted—that is, with strong, vocal involvement in party and interparty disputes and issues;

(4) Seeking political office where a conflict of interest arises between federal duties and duties as an elected official; for example, a HUD grant administrator running for a local political office where the political subdivision is seeking a HUD grant.

These four categories of proscription are specific, easily identified and enforced, and require a minimum of administrative interpretation. In my opinion, no other prohibitions on political activity of public employee are needed to insure the continued effective and impartial functioning of the Civil Service.

While I do not challenge the statutes which maintain the integrity of the Federal civil service system, it is pertinent to point out that the growth of that system in the years since 1939 has given it an entirely different outlook, focus, and profile from earlier years. In this period of time the Federal Government, in response to public demand, has established a large number of programs, policies and activities which basically affect the lives and livelihood of all Americans. The spectrum of occupations engaged in by Federal employees is as wide as that of our society. Federal employees are expected and urged to be full members of the society in which they live and work. I believe civil servants are basically no different from other citizens, and that in order to do their jobs in the broadest sense of serving the public interest they should participate in the activities of that society to the fullest extent consistent with impartial administration of Federal laws.

Our society has decided that most of its aims and purposes can best be advanced through elections and the operation of political parties. The dilemma starts there. The Hatch Act does not interfere with a wide range of minor kinds of political activity, but it does prohibit partisan political activity, and that means the attainment of party objectives —and without efforts to attain party objectives the whole idea of representative democracy becomes anything but democratic. I might have less concern about this aspect of the law were it not for the fact that modern communica-

tions have wrought massive changes in political organizational tactics and activities. Not only political parties, but also all citizens live and operate in an open arena of information about local, State, and national matters and political debate upon them. The conditions of political participation have changed; the prohibitions of the Hatch Act have not. I believe that Government involvement in the lives of the American people has reached the point where too large a percentage of them is being restricted in the free exercise of political rights.

5. Other activities prohibited by the Hatch Act, if allowed, would have no effect, in my judgment, upon the continued effective functioning and impartiality of the Civil Service. For example, I am convinced that it would not adversely affect the quality of the Civil Service to allow Federal employees to run for any local political office without reference to whether the candidate sought the office under an independent ticket or a partisan ticket so long as three conditions prevail: (1) the local office is not a full time job; (2) the compensation for it is minimal; (3) it involves no obvious interference with objective discharge of individual duties. This was the conclusion of the Commission on Political Activity of Government Personnel, of which, as I have indicated, I was a member and with which I agree. Neither do I believe it would adversely affect the quality of the Civil Service for civil servants to express opinions freely, in private or in public, on any political subject or candidate, or to participate in a party caucus.

6. As a former Chairman of the United States Civil Service Commission, I have continued to observe the employee confusion engendered by the vague and indefinite language of the statute as cross referenced to the mass of the pre-1940 decisions. The list of prohibitions growing out of the Civil Service rules is outdated, imprecisely drawn, and consequently so inconsistent as to preclude equitable administration. It follows, I believe, that bona fide Civil Service Commission attempts to explain and apply the statute are bound to result in conflicting decisions because the underlying statute is vague and indefinite. Thus, apart from the fact that the Act prohibits many harmless activities the Act also, because of the incorporation of the pre-1940 rulings, presents an inherently insuperable problem of construction for those charged with administering it: the

Civil Service Commissioners. Although the Commission has published various explanatory pamphlets attempting to clarify the scope of the prohibitions, I think that these attempts, by and large, have not dispelled employee confusion.

ROGER W. JONES

[Notarization Omitted in Printing]

[Title Omitted in Printing]

JAMES H. RADEMACHER, being duly sworn, deposes and says:

1. I am the President of the National Association of Letter Carriers (NALC), AFL-CIO, I have been the president since September 1968. From 1962 through 1968 I was vice president of NALC and prior to that time I served, with the exception of two years spent in the Navy, in the Postal Service beginning in 1941 when I was appointed career substitute carrier. By reason of my contributions to the Civil Service Retirement Fund, I am presently subject to the provisions of the Hatch Act relating to active political management and participation in partisan politics.

2. In my capacity as president of the NALC I have become familiar with the impact on members and officers of the NALC of those provisions of the Hatch Act proscribing political management and active participation in political affairs by government employees. I am also familiar with the confusion engendered by the vagueness of that Act amongst federal employees who are members of the NALC. On numerous occasions I have received letters from NALC members inquiring whether a particular course of action by them is or is not in violation of the Hatch Act. Attached hereto are copies of the following letters which I have received in the regular course of my duties as president of the NALC:

Ex. A, R. W. Whiting to Rademacher, January 25, 1971
Ex. B, R. C. Stager to Rademacher, January 12, 1971
Ex. C, Phillip J. Schmitt to Matthews, March 27, 1971
Ex. D, Wallace C. Rosand to Rademacher, January 18, 1971
Ex. E, Wallace C. Rosand to Matthews, March 8, 1971
Ex. F, Connoughey to Matthews, March 5, 1971
Ex. G, Harold H. McCain, Jr. to Rademacher, January 16, 1971
Ex. H, Lowell J. Matthewson to Rademacher, January 24, 1971
Ex. I, Paul LeClair to Rademacher, January 15, 1971
Ex. J, Edward Dombrowski to Rademacher, January 11, 1971
Ex. K, Edward Dombrowski to Matthews, December 26, 1971

Ex. L, Charles Tornavacca to Matthews, March 6, 1971

Most were sent to me or to NALC's attorney, Thomas C. Matthews, in response to a notice published in NALC's newspaper explaining NALC's participation in this suit and asking the membership to write in response about their personal concerns and experiences as employees governed by the Hatch Act. These letters reflect the employees' confusion as to the scope of the prohibitions of the Hatch Act and the further fact that government employees desire to engage in political activities and would engage in them in the absence of the uncertain prohibitions of the Hatch Act.

3. Based upon the continuing correspondence I received from the membership and upon my personal conversations with members, it is my opinion that many members desire to participate in activities permitted by the Hatch Act but are afraid to do so because local federal authorities misinterpret the prohibitions of the Act. It is also my opinion, based upon the attached correspondence and my conversations with members, that they would actively engage in local politics if such participation were clearly allowed. In many situations employees, because of the fear of job loss, may even be unwilling to try to secure a formal ruling on a proposed activity out of fear of offending a supervisor. Thus the exercise of the right is foregone. In other situations employees simply are unable to understand the various government publications seeking to explain the prohibitions of the Hatch Act and are afraid or unwilling to take the chance of losing their jobs by making a wrong decision.

4. I am personally familiar with the direct and adverse impact of the Hatch Act upon the conduct of union activities. I am a "hatched" employee. I am subject to the prohibitions of the Act even though I am on leave without pay and have no federal duties requiring my time and attention. Of the twenty-four national officers of the NALC, all are covered by the Hatch Act, all of the fifty state directors of the NALC are similarly covered by the Hatch Act. I estimate that 95 percent of all officers of the NALC are subject to the Hatch Act. Because the leadership of the NALC is subject to the Hatch Act, this Union is unable to engage in activities which other unions, not subject to the Hatch Act, do engage in. Specifically, a traditional form of union activity is the advice to the rank and file membership of the

voting records on matters of importance to the membership of candidates for political office. The AFL-CIO, with which NALC is affiliated, regularly distributes to its member unions a tape recording entitled "COPE" discussing the records of various political candidates for state, local and national office on particular issues of vital interest to the union members. As a "hatched" employee of the federal government, I am inhibited from doing what my counterparts in all other unions do, namely distributing this tape to local unions in order to disseminate the AFL-CIO's analysis of voting records and qualifications of candidates on issues of vital importance to union members. I am informed and believe that such activity on my part might be construed to constitute soliciting votes on behalf of a partisan candidate.

5. I am convinced that if the members of my union were clearly permitted to engage in local politics and to express publicly their views on political candidates that a substantial number would do so. I am also convinced that their engaging in such political activities on off-duty hours would in no way impair their effectiveness on the job during working hours. In fact, I believe permitting such activities would probably improve employee morale considerably. Under the present system, union members feel like second class citizens, and do not understand why they are singled out to be prohibited from engaging in local partisan politics or from freely expressing their political views. Frequently coupled with this sense of being deprived of the rights that all other citizens enjoy is an attitude of fear of engaging in any political activity since the penalties imposed by the Hatch Act are extremely severe—termination or a thirty day suspension. In my opinion, both as a former letter carrier and as a union official familiar with the employment situation of letter carriers and other members of NALC, removing the prohibitions against local partisan activity and free political expression would have a positive and favorable effect on the efficacy of federal employees.

JAMES H. RADEMACHER

[Notarization Omitted in Printing]

January 25, 1971

Mr. James Rademacher, President
National Association of Letter Carriers
100 Indiana Avenue
Washington, D.C. 20001

Dear Mr. Rademacher

Please refer to the NALC's bulletin (#1, dated January 7, 1971) where you asked for our stories on how the Hatch Act has affected us.

Under section three of this request here is my story: My wife, a Chicago School teacher, has acted as a Democratic judge in our precinct, in DuPage County, for almost every election for the past three years. This election, the November 3rd one, both of us wondered why I couldn't be a judge.

I asked everybody in the Glen Ellyn Post Office and got the same answer, No!

When I was finally referred to the Postmaster, he gave me the same answer, but with the suggestion that I call the Chicago Regional Office and asked the legal council of the Post Office. I did and got the same answer, No!

Now this is just a little silly. On the day of the election the campaign is over. The voters come to the polling place with their minds made up. And I couldn't campaign if I wanted to, some judge of the other party would run me out. That is why they have judges there from both parties.

R. W. WHITING, *Secretary*
Branch 2402—NALC
378 Cottage
Glen Ellyn, Illinois 60137

Ex. A [to Rademacher Affidavit]

January 12, 1971

Dear Sir;

In June 1968, I wanted a leave of absence to run for Clerk of Court, Floyd County, Georgia. The Postmaster at Lindale, Ga., where I am employed, notified the Regional Office, Atlanta, Ga. of my request. He in return received a letter on June 5, 1968 from the Regional Office. The Post Office form 1702, dated April, 1967 was returned with all squares checked except No. 2 (Title and location of the office). The following statement was typed on the bottom of the form: "Mr. Stager may not run for Clerk of the Court without specific approval of this office. Leave without pay for the purpose of campaigning would come under the restrictions of 721.53 Postal Manual." The form was signed "C. B. Gladdin".

R. C. Stager
Rural Carrier
Lindale, Ga. 30147

Ex. B [to Rademacher Affidavit]

2045 E. Beckert Ave.
Pittsburgh, Pa. 15212
March 27, 1971

Mr. Thomas C. Matthews, J.
1320—19th S. N. W.
Washington, D. C.

Dear Mr. Matthews:

I am enclosing a letter from James H. Rademacher to me, which will explain why I am writing to you.

On the day of the primary election in Pa. in 1947, much to my surprise and without my knowledge I discovered that I was a write-in candidate on the Democratic ballot for the office of "School Director" of Reserve Township Allegheny County, Pa. in which I live. It followed that I won that nomination and the very next day I notified Mr. Wm. Sullivan, who is now deceased, my supervisor at the North Side branch of the Pittsburgh Post Office, of this fact and after consulting the Post Office Laws & Regulations he told me that I could not run for this office. An assistant, Mr. Babylon also now deceased disagreed and said that there was an amendment to this rule, permitting the holding of the office of school director by federal employees. We three looked at this amendment and at least tacitly agreed that everything was in order.

I went on to win in the general election but was concerned about receiving a small salary of $400. per year which I would receive as Treasurer of the school board, to which I would subsequently be appointed. I then tried to consult with the then postmaster of Pgh. Pa. Mr. James C. Smith who is also now deceased, concerning this salary. Mr. Smith being very busy asked me to come back to see him when this appointment would be made. It happened that as time went by I had forgotten all about returning to see him, as I had become very busy in my new role.

During this period in 1949 the secretary of the school board had to resign because of poor health and I was appointed to that vacancy.

I was asked to run again in 1951 for that same office, this time on the regular ticket. I did so and won again. I served that term of six years after which I felt I had enough and announced this to those concerned. I was prevailed upon

by the president of the school board, the principal of the school and the Democratic ward chairman and others to run again for the office. Feeling that I could still contribute something I consented.

About a week or two before the general election in 1957 the bombshell fell. I was called over to the Civil Service Commission to answer a charge that I was engaging in political activity since 1947.

I was so amazed to find out that there could be anything wrong with my activities concerning the school board. The rest is a matter of record. I was dismissed from my employment, subject to a hearing which I requested and received.

The investigation and hearing disclosed that I was not guilty of any overt political activity, but that my running on a national political party ticket each time except that of the write-in ballot constituted violations of the Hatch Act. The Civil Service Commission also stated that I should have sought their council instead of relying on the opinion of my supervisors. I received a ninety day suspension from my employment as penalty.

Having won the 1957 election, I immediately resigned as School Director of Reserve Township and relinquished the office of Secretary of the Board shortly thereafter. Needless to say this has been quite a shocking experience for me and has affected my outlook on life itself.

To answer some of the questions posed by Mr. Rademacher, I present the following: I was aware of the Hatch Act but because of the amendment to the P. L. & R. I believed my activities to be exempt.—My experience in this case has completely stopped me from any political affiliation whatsoever.—A School Director in Pa. is a member of a Board of Directors which carries out the laws of the State regarding the education of its constituents. It is largely a policy making body. School directors serve without salary or pay.

I trust that this information may help you in presenting a challenge to the Hatch Act.

Sincerely Yours,

PHILIP J. SCHMITT

Ex. C [to Rademacher Affidavit]

Jan. 18, 1971

[Letterhead Omitted in Printing]

Mr. James H. Rademacher, President
National Association of Letter Carriers
100 Indiana Ave., N. W.
Washington, D. C. 20001

Dear Jim:

In response to your request from any letter carrier who has ever been investigated for violation of the Hatch Act, I will tell of my case.

During either the 1960 or 1962 election, my wife and I, along with two other Duluth, Minn. couples by name of Mr. and Mrs. Helmer Hanson and Mr. and Mrs. Guy Spangenburg, went to a Democratic-Farmer Labor Bean Feed at the Shrine Auditorium in Duluth. After the speeches and meal was over, the MC announced that several young ladies would circulate throughout the crowd requesting donations for advertising space in the local paper. When the young lady asked me if I wished to donate and sign a paper signifying that I had contributed, I told her I was a Federal employee and couldn't do that. My wife told the young lady that she would donate a $1.00, which she did signing her name Mrs. W. C. Rosand. The next day the add appeared in the local paper but the publisher had left off the prefix Mrs. so the name appeared in print—W. C. Rosand. When I saw the ad, I called the Postmaster at the time, Mr. Glen Merritt and informed him of the error. All he said was there wasn't anything he could do about it. So I didn't do anything about it either. After a short period of time, I was informed that a fellow from the Civil Service Commission was coming to Duluth and wished to meet with me. I met with him after work and told him the complete story about the events. (On the way home from the Bean Feed I had explained to the two couples that we had gone with, the reason why I couldn't sign my name to an ad, I also had told Mr. William Watters, a Duluth attorney who was active in the DFL, about why I couldn't sign such an ad.) I also had gone down to the DFL Headquarters to see if they still had the paper that my wife had signed, which they did. I asked Mrs. Ingred Wells, who was also active in DFL circles and who eventually became our acting PM, if she would hold

on to the paper in case anything ever came of it. Of course, I gave the Civil Service investigator the names of all the people who knew about the event and he made appointments with each of them and received corraborating statements from them about my involvement. When he went down to the DFL Headquarters, Mrs. Wells still had the paper my wife had signed and he took a photograph of it. A few weeks after the investigator was here in Duluth, I received a letter from the Civil Service Commission clearing me of any wrong doing.

Shortly after I had received the letter from the Commission, I couldn't refrain from having a few words with the postal inspector who had turned me in. I told him that if he had been any kind of a man he at least would have come to me and asked my side of the story. I had no knowledge whatever that I had been turned in until I received the letter from the Commission requesting a meeting.

In my opinion, the Hatch Act should be declared unconstitutional because there is no reason why we, as Federal employees should not have the same rights as ordinary citizens. Personally, it was embarrassing to me to have my friends bothered for such an investigation and my friends who were questioned felt the same way.

Good Luck.

Sincerely,

WALLY ROSAND

Ex. D [to Rademacher Affidavit]

March 8, 1971

[Letterhead Omitted in Printing]

Mr. Thomas C. Matthews, Jr.
1320-19th St., N. W.
Washington, D. C.

Dear Sir:

I wrote to President Rademacher of the National Association of Letter Carriers on January 18, 1971 detailing my experience the time I was investigated by the Civil Service Commission for violation of the Hatch Act. I received a letter from Mr. Rademacher in return in which he asked two questions, the first, has this experience or the Hatch Act itself deterred you from engaging in political activity? My answer to this is yes. I happen to be a individual who has strong beliefs towards one political party and I would like to do lots of work to help this party. At the present time, my wife does help but I would like to be able to engage in helping do some mailing etc. for them. The other question, "Is there any specific activity which you feel you would like to engage in were it not for the Hatch Act? My answer to this is also yes. As I mentioned above I would like to help more on detail work. I also would like to be able, publicly, to endorse candidates when they have their ads in the papers.

I think the Hatch Act is a violation of the human rights of Federal employees and it should be taken off the books at the earliest possible time.

Sincerely,

Wallace C. Rosand,
3945 Maxwell Ave.
Duluth, Minn. 55803

Ex. E [to Rademacher Affidavit]

Ligonier, Pa.
March 5, 1971.

Dear Sir,

Recently received a letter from our President, James H. Rademacher concerning the Hatch Act.

I wanted to run for the office of School Director. It was a "partisan" election in the sense you would have to run as a Democrat or Republican. I did desire to run as a party candidate. When I wrote to the Civil Service Commission in Philadelphia, Pa. asking for permission, I definitely wanted a yes or no answer. My letter was assigned to the Interagency Board of U. S. Civil Service Examiners for Central and Western Pa. located in Pittsburgh, Pa. My reply was:

Dear Mr. M. Connaughey:

Reference is made to your recent request for information on political activities permitted Federal employees.

We are enclosing two pamplets [sic] on Political activity which you can apply to your individual situation.

If you have any further questions, please advise.

Sincerely,

STANLEY F. BREM
Ass't Executive Officer

The two pamphlets were "Political Activity of Federal Officers & Employees", and "Code of Ethical Conduct."

After reading the two pamplets, [sic] I did decide not to run because I wanted to be a party candidate.

Our School Directors meet once a month for a regular meeting which would last for perhaps four or five hours. The duties involve agreeing on a budget and school procedures, etc. When it is "budget time" considerable more time is involved. Depending on hoy active a director wishes to be a total of 2 evenings a week can be devoted to this work.

When I first decided to be a candidate for School Director which was last July, that was when I was seeking a definite "yes or no" from the Civil Service Commission. As peti-

tions are now being cir[illegible] for the primary election in May.

I would certainly desire to run for School Director if it were not for the Hatch Act.

Hoping this information is helpful to you for your proposed challenge to the Hatch Act.

Sincerely,

JOHN L. MCCONNAUGHEY
Br. 3530 N.A.L.C.
RD#3-9-B
Ligonier, Pa. 15658

Ex. F [to Rademacher Affidavit]
[original of letter was in longhand]

18 Noank Ledyard Rd.
Mystic, Conn. 06355
Jan. 16, 1971

Mr. James Rademacher
President
National Association of Letter Carriers
Washington, D.C.

Dear Mr. Rademacher:

I am writing you regarding your recent request for information for possible use before the courts regarding the Hatch Act.

I live in the town of Mystic, which is part of the Town of Groton, Connecticut. All elective offices within the Town are non-paying offices. Our structure is basically—a nine member Town Council, and 40 member Representative Town Meeting, Board of Education and the various Selectmen.

I am now, and have been for five years, active in the PTA. In the fall of 1969 I was approached by the Chairman of the Democratic Town Committee (Mr. Mortimer Wright) and asked to run for election to the Board of Education. Needless to say because of my interest in education I was very interested. The Postmaster at the Mystic Post Office told me I could not seek this office because of the Hatch Act. I inquired with the Civil Service Commission and received a pamphlet entitled "Federal Employee Facts, Political Activity Rules for Federal Employees, Fact No. 2, 1964-0-726-856." This stated that I may not participate in a partisan political election. I refused the nomination. It may be of interest to know that the person who replaced me as the party candidate was elected and is now the Chairman of the Board of Education for the Town of Groton.

A few weeks ago I was asked to seek the Town Committee endorsement for filling a vacancy in the Representative Town Meeting and represent the Mystic area. I was told by management that I could not accept appointment to an elective office. I again refused to participate in the nomination process. There appears to be a Board of Education vacancy coming up soon as a result of a member resigning. This again is an elective office that would be filled by appointment until the next general election. I will be ineligible to accept this nomination.

I am now President of the Groton PTA Council and represent 15 schools when discussing educational goals, concepts, etc. My term expires in May 1971 and I will not seek reelection to this nonpartisan office. It is very frustrating not to be able to participate in the formation of policy concerning your own community. I shall as I guess most Federal employees do, sit back and let someone else make my decisions for me. Obviously, since I cannot actively participate, why participate at all?

Very respectfully,

HAROLD H. MCCAIN JR.
Career Carrier, T-5
Branch 1429, NALC

Ex. G [to Rademacher Affidavit]

NOTE: All elective offices for the Mystic area are held through the Town of Groton—Mystic itself falls in the Groton political structure.

[Letterhead Omitted in Printing]

24 January 1971

James Rademacher, President
National Association of Letter Carriers
100 Indiana, N.W.
Washington, D.C.

Dear President Rademacher;

This is being written in response to a request you made in Bulletin Number 1, January 7, 1971 for information concerning alleged violations of the Hatch Act.

Some years back, perhaps twenty, I was elected delegate to the Dubuque County Republican Convention. The morning after this fact was published in the local paper I was called into the local postmasters office and was told that if I attended this convention as a delegate, I would lose my job. I wrote the Republican Central Committee of this county and notified them that I would be unable to fullfill the duties of delegate.

Needless to say, since I am still a letter carrier, I have refrained from further political activity. This has been entirely because of the Hatch Act. I feel that without the Hatch Act, or other similar law, I would have become very active in local politics.

I have contacted a member of the Central Committee of the local Republican party and am attempting to determine the date of the above incident. Anthony Schrup, since retired, was our postmaster at the time.

LOWELL J. MATTHEWSON

Ex. H [to Rademacher Affidavit]

Jan. 15, 1971
Two Rivers, Wisc.

President James Rademacher
N.A.L.C.
100 Indiana Ave. N.W.
Washington, D.C. 20001

Dear President Rademacher:

The N.A.L.C. Bulletin of Jan. 1, 1971 carried a request for instances of adverse impact of the Hatch Act on someone's wishes or conduct. Also names of employees who have refrained from participation in politics because of fear of violating the Hatch Act.

I feel I fit in this category. I was appointed a Sub. Carrier on Apr. 1, 1949 and have since been promoted to Supt. of Mails and in 1970 to Asst. P.M., Level 10. I am still an Associate member of the N.A.L.C. I am 46 years old and I have always felt that one of the greatest fringe benefits we have is optional retirement at age 55. However one must have something to retire to at age 55 and I feel politics is extremely exciting as a second career. To hold State Political Office some day as a assemblyman or Senator is as much my lifes ambition as a successful Postal Career has been.

To be successful it is imperative that I identify myself with a Political Party now and perhaps as County Chairman prepare myself to run as a candidate for State Office when I am eligible to retire. As it is now I can only pay dues and go to meetings but I am very reluctant to participate or even voice my opinion for fear of violations of the Hatch Act and possible reprisals.

As a Citizen, property owner, taxpayer, and father of 9 I sincerely believe the Hatch Act is discriminatory against me because I cannot fully participate in Partisan Politics or run for or hold Political Office while an employee of the U.S. Post Service. My neighbor is an employee of the Wisconsin Public Service Corp. and has none of these restrictions. If the new U.S. Postal Service is truly free of Political influence the Hatch Act should and must be repealed.

On another note, when on when, are we going to ask for compulsory retirement at age 65. All employees and

their organizations continually ask for comparison to private industry so lets join them on 65 retirement. Any R.I.F. should start with this change not only to open more promotion opportunities but to provide a more vigorating new U.S. Postal Service.

Sincerely Yours,

PAUL LECLAIR
324 22nd St.
Two Rivers, Wisc. 54241

Ex. I [to Rademacher Affidavit]

[Letterhead Omitted in Printing]

January 11, 1971

President James H. Rademacher
100 Indiana Ave., N.W.
Washington, D.C. 20001

Dear Jim:

According to the NALC Bulletin No. 1, dated Jan. 7, 1971 our office is seeking documented information so that we who have been prohibited from taking an active citizen participation in local government due directly to the provision of the unconstitutional Hatch Act.

Jim, as you may know I have been hoping and yes praying for years that someone or something could be done with this Hatch Act, I even mentioned it several times at our seminar and to postal officials, that I would like to be given the opportunity to make a test case of the certain provisions of the Hatch Act against me taking an active part in my government and seek local office as a partisan candidate. I will not go into great detail on my past and present activities in local government for now but will wait your reply, if you are interested in more details or the legal counsel Tom Matthews, Jr.

Since May of 1968 I have been placed into an odd situation time after time in my efforts to devote my valued services toward the betterment and helpful services in our local township government in Buena Vista Charter Township. All due directly to the unconstitutional provisions of the Hatch Act. Since 1950 I have been active in a limited way in our local township affairs. But it seems when I want to take a more active roll and run for office or become more involved I MUST SEEK THE PERMISSION OF THE LOCAL OR REGIONAL POSTAL OFFICIALS to take more active roll in my government as an interested citizen.

May 1961 I first asked the local Postmaster of the limitations of the Hatch Act because of my employment as a letter carrier at the Saginaw Post Office, I wanted information so that I could run and seek the office of trustee in Buena Vista Township. You would have thought the world caved in when I was told my chances were very slim, by the local officials. Of course then I really wanted to run and get permission as I was told I would have to do. The local officials were stunned when I pursued the issue.

It seems like in the whole U.S. nobody ever questioned the provisions of the Hatch Act, in May of 1961, at least in the local area and in the Chicago Region. After several months of inaction and we are checking Etc. I sought the assistance in July 1961 of Rep. Congressman James Harvey from the 8th District of Michigan to help me seek an OK to run as a candidate on the Union Party (the only party at that time in the township). Again and again I was stunned by the delays and inaction in one way or another, from the local Postal officials, the Regional and even the Civil Service Commission in Washington, D.C. and finally went up to the 3rd in Command in the Post Office Department just below the Postmaster General, one of his Asst's. The deadline for filing was Dec. 31, 1969. I was called at my home by Congressman Harvey in the afternoon of Dec. 28th, I think, I wasn't home. Then my wife told him I was at work, so thus Rep. Harvey called at the local post office where I was on duty and spoke to Rep. Harvey on the phone and he assured me that the Post Office Department has given me the green light to file my petitions. Rep. Harvey also stated that a confirmation in writing is on its way to the local Postmaster Billy Monroe from the Post Office Department which I insisted on. Well anyway I did file and was defeated for the office of Trustee in the Spring Election of 1962.

In the spring of 1964 a citizens group formed and organized and we formed an official local party called the Progressive Party to seek candidates and oppose the party in power locally with our own platform (which incidentally has been almost to the full extent adopted by the incumbent office holders over the years). We filed our required petitions as per the state statutes on May 22, 1964 with the Township Clerk. Again I was asked to head the new party as Chairman and ran for the office of Clerk after again going to the local Postmaster and begging his permission to run for local office, I was granted this permission to seek the office of Clerk. I was defeated in the election, Nov. 1964.

In the fall of 1965 we had an election to incorporate into a City with 9 City Charter Commissioners to be elected, I asked and received permission from the local Postmaster after much delay and discussion to run for the charter commission. I filed as a candidate and was elected. I

served as the Secretary and conducted several elections in the incorporated area, but due to the fear of high taxes we didn't succeed.

In 1967 the State Legislature passed a law in which all local splinter parties such as: our Progressive Party, Union Party, Peoples Party, and others were disallowed to be on the state election ballots. Since 1967 if I or others in the Federal employment would seek to run in local or any other elections, except where there is a non-partisan election as provided by a City Charter, we are prohibited to seek or take an active part now in the elections because of the partisan elections, where I would have to seek office as a Democratic or Republican candidate. As you and I know this is not permitted by the Hatch Act, for me as a letter carrier. Unless I would want to be dismissed from the Post Office.

Over the years I have taken part in local politics but in a limited way due to the direct conflict and always seeking permission and to be nicey-nicey or there was always that Hatch Act to stand in my way and its provisions.

At the present time I am directly involved in our township government affairs and many people have asked me to take an active part and I keep pointing out to them the Hatch Act and its provisions in partisan politics. I wanted to in the worst way to run for office this summer and fall for Township office but because of the state law and that I must run as a Democratic or Republican candidate, I could not afford to lose my job and then who would support my 5 children and wife. We are right now having a small revolution in Buena Vista and I'm again asked to take an active part which I am doing but not in a partisan way, right now. The incumbents of 20 years have been defeated finally and fresh blood has come in but to our disappointment and there may be a Recall Petitions for the Supervisor or maybe others too. So I'm being asked to be a candidate now if the Recall is called for. Of course here again I stand to get fired from the Post Office because of the partisan election set up. I appeared before the Township Board at last weeks meeting in request of many citizens to ask them of many questionable and legal actions they have taken recently and will do so again on Feb. 1, 1971.

Jim, should I make an attempt and seek the office of Supervisor and make a test case if the Recall Petitions

comes about? First seeking permission from the local post office. To see if they will grant my request.

Please excuse all the misQ's in typing. I'm tired but wanted to get this letter out to your office. I hope you can make it out and I'll try and find all the documents now in case you or the Counsel might be interested.

Sincerely yours,

EDWARD M. DOMBROWSKI

Ex. J [to Rademacher Affidavit]

Edward M. Dombrowski
190 S. Outer Drive
Saginaw, Michigan 48601

December 26, 1971
Phone 1-517-753-7357

Mr. Thomas C. Matthews, Jr.
Attorney At Law
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Matthews:

This letter is in regards to my deep concern on the outcome of the court suit coming up concerning the Hatch Act vs NALC and others, me included. As your files will indicated I sent you materials last spring of 1971 of the conflict I have had in seeking local office and the chilling factor the Hatch Act has had on my becoming active in my local governmental affairs, in the township and the county.

I would hope that a favorable decision is soon rendered because of my interest in seeking a local partisan township office or a county commission representative also on a partisan basis. As you well know the Hatch Act is very restrictive to me and others to take an active part in our government and we hope to win the case. Any thing that I might be able to do to assist the suit, please let me know. I understand that a decision may be rendered in February, if so please let me know so that I can set the wheels in motion to seeking local office.

PS: I maintain that my constitutional rights are being denied me by the provision of the Hatch Act which have nothing to do with my job employer.

Sincerely,

Edward M. Dombrowski

Ex. K [to Rademacher Affidavit]

[Letterhead Omitted in Printing]

March 6, 1971

Thomas C. Matthews, Jr.
Attorney at Law
1320-19th Street
Washington, D.C.

Dear Mr. Matthews:

This letter is a follow up of my January 12, 1971 letter to the union's National Office.

The fear of the severe penalties from the Hatch Act prevented the Union from publishing in its newspaper the "Rubber City Mailman" the Akron Labor Council's recommendations for election to office in the November 4, 1969 election. The Union's fears were justified with the receipt of the November 19, 1969 letter from the U.S. Civil Service Commission. The fear of the Hatch Act penalties has deterred the union from freely participating in the 1969 and 1970 elections. The Union desires to endorse candidates and issues.

The Union in its desire to have removed from office the Congressman from the 14th District of Ohio, did republish facts as stated in the enclosed flyer, for distribution among union employees. Pressure was applied to me by my immediate supervisor who claimed that I was violating the Hatch Act. The Union did not apply its name and address to the flyer for fear of violating the Hatch Act. The flyer was then questioned as being in violation of State and Federal laws on political literature.

The Union wishes to freely participate in political activities. The Union's Executive Board on February 24, 1971 unanimously agreed it feared the Hatch Act due to its severe penalties. The Board believe the Hatch Act violates the Constitutional Rights of the Union and its members. I believe the Hatch Act violates the Freedom of the Press by restricting the "Rubber City Mailman" to not publish endorsements of political candidates and issues while the U.S. Constitution permits this freedom to other newspapers.

As a member of the Akron Labor Council's Executive Board, I believe my civil rights are being violated by the Hatch Act in view of the fact that my political activities are restricted while the other members of the Board are free to fully participate in politics.

The Union known as the National Association of Letter Carriers, Rubber City Branch 148, Akron, Ohio, and its members wish to be permitted, without fear of Hatch Act penalties, the right to freely participate in all political activities.

If I can be of any service to you on this matter, please feel free to contact me. I will avail myself on a moments notice.

With sincere best personal wishes, I am

Sincerely yours,

Charles Tornavacca
CHARLES TORNAVACCA
President, N.A.L.C. Branch 148
Akron, Ohio

Ex. L [to Rademacher Affidavit]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

MOTION FOR PROTECTIVE ORDER

Defendants, by their undersigned attorneys, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, hereby move the Court for a protective order directing that the Notice of Deposition to take the oral testimony of the Civil Service Commission on January 17, 1972 be vacated and ordering that the deposition not be taken. The ground for this Motion is that the Court has already held discovery inappropriate on the subjects which the Notice indicates that plaintiffs seek to examine.

In support of this Motion, the Court is respectfully referred to its Order of December 6, 1971 herein and to the Points and Authorities filed herewith.

Respectfully submitted,

L. PATRICK GRAY, III
Assistant Attorney General

HAROLD H. TITUS, JR.
United States Attorney

HARLAND F. LEATHERS
DAVID J. ANDERSON
Attorneys, Department of Justice
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

ORDER

This matter having come before the Court on defendants' Motion for Protective Order asking that the Notice of Deposition filed by plaintiffs to take the oral testimony of the Civil Service Commission on January 17, 1972 be vacated and the Deposition ordered not taken, and the Court having considered the papers submitted by the parties and its previous Order of December 6, 1971, and it appearing that defendants' Motion is well taken, it is, hereby, this 13 day of January, 1972.

ORDERED that the Notice of Deposition filed by plaintiffs to take the testimony of the Civil Service Commission on January 17, 1972 be and is hereby vacated and the Deposition be and is hereby ordered not to be taken.

GERHARD A. GESSEL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

STIPULATION

The parties, through their undersigned attorneys, hereby stipulate and agree that the following exhibits shall be deemed offered and accepted into evidence at the trial of this action:

1. Verifications of Complaints by Mr. Gee, Mr. Wylie, Miss Pinho, Mr. Myers, Mr. Hummel and Mr. Mandocino.

2. Affidavit of Anthony Mondello, dated September 1, 1971, and its attachments.

3. The incorporated determinations filed herein.

4. Defendants' Answers to Interrogatories and exhibits thereto.

The parties further stipulate that the following items shall be deemed offered into evidence at the trial hereof, subject to defendants' objection to the introduction thereof on the grounds of relevancy:

5. Affidavit of Roger W. Jones, dated January 5, 1972.

6. Affidavit of James H. Rademacher, dated January 7, 1972, and its attachments.

In addition the parties stipulate and agree that the court may take judicial notice of the following items, true copies of which have been filed in this action for the convenience of the Court:

7. United States Civil Service Commission, Pamphlet 20, May 1966, "Political Activity of Federal Officers and Employees."

8. Civil Service Commission Form 1286, "Political Activity and Political Assessments."

9. The report of the Commission on Political Activity of Government Personnel, 3 Volumes (1967).

10. The Civil Service Commission Political Activity Reporter, 3 Volumes (1971).

THOMAS C. MATTHEWS, JR.
Attorney for Plaintiffs

DAVID J. ANDERSON
Attorney for Defendants

Dated: 2/29 1972.

SO ORDERED:

For the Court

GERHARD A. GESSEL
United States District Judge

[Title and Index Omitted in Printing]

[3]

PROCEEDINGS

MR. TRUITT: The plaintiffs call Roger Jones. Whereupon,

ROGER JONES

was called as a witness, and having been first duly sworn by the deputy clerk, was examined and testified as follows:

MR. ANDERSON: Rather than interrupt the questioning of Mr. Jones, I would like to state our objection to his testimony is the same as our objection to the consideration of all of the affidavits.

JUDGE GESELL: A continuing relevance objection?

MR. ANDERSON: Yes, sir.

JUDGE GESELL: I would like to say this to you, Mr. Truitt. While counsel have stipulated to this gentleman's qualifications, I think it would be helpful if you asked him briefly to give the Court some understanding of his experience without attempting to fully qualify him. Just give us some idea of who he is.

DIRECT EXAMINATION

By MR. TRUITT:

Q. Mr. Jones, would you please answer that question?

A. Gladly. Your Honor, I have been in the Federal service from 1933 until my retirement in 1968, with two recalls since then. During most of this period I served as staff officer in the Bureau of the Budget, recently in 1970 [4] renamed the Office of Management and Budget. I was some nine years its Assistant Director for Legislative Reference. Thereafter, I was statutory Assistant Director. I was Deputy Director. President Eisenhower appointed me Chairman of the Civil Service Commission in 1959. I served there until the start of the administration of President Kennedy. He transferred me to the Department of State as Deputy Under Secretary of State for Administration, a chief personnel position of the Department of State. Thereafter, I returned to the Bureau of the Budget to serve as a Consultant and Special Assistant to the Director, largely concerned with personnel matters, personnel policy and things of that kind.

JUDGE GESELL: Very well.

By MR. TRUITT:

Q. Mr. Jones, in your affidavit filed in this action, you list four major categories of partisan political activity, which Government employees should be prohibited from engaging in.

Directing your attention to the third category—serving as an officer of any national or state political party; or serving as ward or precinct officer—would you explain in your opinion what would occur if public employees were permitted to engage in those activities?

A. In my opinion there are three answers to that question, Mr. Truitt. The first, and perhaps the least relevant for legal purposes, but certainly for public purpose is relevant, is [5] the fact that it would be, I think, almost impossible to assume an office of that kind without the assumption being made that the incumbent was ready and willing at all times to engage in partisan activities, inter-party disputes and things of that sort.

The second reason, which I think has more relevance, is that I think any party officer has an obligation to uphold positions and stands of his party, to do so publicly, and I believe this could create controversy.

While neither of these may be of the utmost final importance, I believe the fact also remains that the occupation of such a position would be very generally misunderstood by the public, and might give the appearance that the individual was open to demands, or was in a position to do things which would not be consistent with his office as a Federal employee.

Q. Turning to the first of the categories which you have listed as a prohibited act in your affidavit, running for national office such as President, Vice President, Senator, Representative or elector, would you explain to the Court what effect permitting such activity would have on civilian work force?

A. I believe there is automatically a most serious conflict of interest, which would be immediately raised as soon as the person accepted the candidacy, but above and beyond that, the individual would be put in the impossible position of either having to oppose, if he were from the opposing party, the programs of the Government which the other party sought to [6] change, or possibly the equally difficult

position of supporting positions which might be in conflict with the responsibilities of his own department or agency. We do have inter-agency conflicts in which Federal officers have to be most careful to maintain their own point of view. Above and beyond that, since I think under the Constitution every Federal officer is tied by a given line of attachment, even though it is indistinct at times, to the President as the Chief Executive Officer of the Government, that you would be placing a man in a potential position of being in opposition to the President, which I do not think is proper.

Q. Mr. Jones, the second prohibition described in your affidavit necessary to maintain the effectiveness and impartiality of the Civil Service is the prohibition against solicitation of funds, or any other partisan coercion exerted on employees. Is the prohibition against seeking national office necessary to protect against coercion of Government employees in your opinion?

A. No.

Q. Would you explain the basis of that opinion?

A. I believe that of all political activities, certainly the most pernicious is the utilization of any public office to intimidate, coerce, or even request fellow employees for contribution of funds, or contribution of time and effort on behalf of a partisan political purpose. I do not see that [7] there is any relationship between running for National office and this other obligation which transcends that. I believe a man could run for National office and still be most correct and punctilious about not seeking funds from Federal employees or fellow employees. But, I do not think that anyone, regardless of whether he runs for office, should be permitted to seek funds for partisan purposes.

Q. Mr. Jones, your affidavit also states that permitting public employees to run for local offices on a partisan ticket would not adversely affect the effectiveness of the Civil Service. Would you first describe what you mean by local office, and then explain what effect in your opinion it would have on the Civil Service to allow people—public employees to run for those offices?

A. May I make one slight correction, Mr. Truitt. I think when I said that I referred to certain kinds of offices which I will now explain. I think there are some offices that it would not be appropriate for Federal employees to run for.

The situation here is one which is extremely difficult,

your Honors, to try to bring into the detailed kind of focus that is a result of the change in the nature of the Federal Government programs over the course of the last thirty years. But, in an effort to be quite brief, let me put it this way.

I am absolutely convinced that in today's world, the Federal employee should be to the greatest extent possible, [8] a part of the society in which he lives. The spectrum of Federal occupations is as broad as the spectrum of occupations in American life. The programs and activities of the Federal Government have extended now to the point where, to use a figure of speech of my own, it seems to me that the Federal Government now is in the livingroom of Mr. and Mrs. America today across the land.

Under these circumstances, I think there are a great many obligations to the society in which we live, which should not be denied to Federal employees. Some of these, because of the state laws and other requirements, involve local partisan offices. They are not full time jobs. They are not jobs for which the compensation is substantial, or in some cases, it doesn't exist at all.

JUDGE GESELL: You are talking about such things as School Boards.

THE WITNESS: School Boards, Zoning Boards, Boards of Tax Appeal, in some jurisdictions the election officers of the state or of the town, registrars of voters and things of this kind, moderators at town meetings, and I could go on and give a rather long list. But, I think that list is illustrative enough.

JUDGE GESELL: Do you have any idea how many individuals are "Hatched" so to speak, in the country today? How many people are covered by the statute?

[9] THE WITNESS: In terms of Federal employees?

JUDGE GESELL: Yes.

THE WITNESS: All Federal employees of the Executive Branch generally are under the Hatch Act, except those appointed by the President and affirmed by the Senate.

JUDGE GESELL: What is that number today?

THE WITNESS: The number today is, I would say, approximately three and a half million.

JUDGE GESELL: And, with the state employees that are covered by the statute, how many more would you say?

THE WITNESS: This, I am afraid, we do not have any kind

of count on at the present time for one reason, and I think the reason is this. The growth in recent years of the Federal Grant and Aid Program, from a very small scale to now upwards of 40 billion dollars, is involved in view of the fact that the prohibition under that section of the act runs to persons whose principal employment is in a program financed in whole or in part by the Federal Government.

JUDGE GESELL: Do you have any idea or expert guess or estimate as to how many that would be?

THE WITNESS: Again, I would say in excess of three million.

JUDGE GESELL: So, that probably the coverage of the Act is generally in the neighborhood of six or seven million.

THE WITNESS: Yes. I am a little uncertain of my [10] Federal figure. I included in that figure persons who literally may not be covered. The Federal figure may be incorrect. It may be closer to 2.8 million than three and a half.

JUDGE GESELL: Roughly six.

THE WITNESS: In the neighborhood at least of six million employees I am quite sure, and then by implication many others are covered by similar statutes, or a similar application of law. A number of the states have set up their own.

JUDGE GESELL: Yes. Thank you.

By MR. TRUITT:

Q. Now that you have described what you mean by local office, do you think it would have any effect on the quality of the Civil Service to permit Government employees to run for such offices?

A. Will you repeat the question, Mr. Truitt?

Q. In your opinion, what would the effect be on the quality of the Federal Civil Service to allow Government employees to run for the local offices which you have just been describing?

A. You mean the part-time offices?

Q. Yes.

A. I think the good effect would be to make these people recognize the importance of their being a part of the society in which they live to the fullest extent, and further, above and beyond that, it would give them a much greater awareness of the interlocking issues that exist today as between Federal, [11] State and local Government.

In fairness, I might add, Mr. Truitt, there could be conceivably one small negative impact, which could be in the

nature of at least initially some public misunderstanding as to what the reason for this was. I think that if we move in this direction, we will have to make sure that the proper explanation is given to the American people.

Q. Would there be any other negative effect on the quality of the Civil Service?

A. None which is relevant or substantial in my view. One can always find reasons to complain about participation in politics of any sort. I think one other indirect thing, which should perhaps be mentioned, is one I have tested against experience rather carefully over the years.

As things now stand, it is possible for the Civil Service Commission to declare areas in which participation by Federal employees in political matters can take place so long as they run on a non-partisan ticket. While I have no doubt at all many non-partisan movements start as exactly that, over the course of time that they continue, they are certainly not non-partisan. They are just as much partisan, in my judgment, as those who carry their Republican or Democratic name tags with them. To that extent I think there is involved a degree of rationalization rather than rationale about this business of non-partisan participation in elections.

[12] MR. TRUITT: No further questions.

JUDGE GESELL: Mr. Jones, I had a question on your affidavit that I did want to take this opportunity to ask you to elaborate on a bit. You say on Page six that you have continued to observe the employee confusion engendered by the vague and indefinite language of the statute as cross referenced to the mass of the pre-1940 decisions. Could you give us a little better idea of what you are talking about there?

THE WITNESS: Yes, I can, sir. In various of my jobs, including the most recent period of service in the Office of Management and Budget and Bureau of the Budget, because of my former experience, I have had even our rather sophisticated and highly graded and highly paid staff come to me on countless occasions to ask whether I thought this, that or the other activity was prohibited by the Hatch Act.

Above and beyond that I have seen on any number of occasions employees attempt to read Pamphlet 20, or to look at the poster which the Civil Service Commission has

the agency post on their bulletin board, with a list of "dos and don't" or "permitted and not permitted", and stand there and shake their heads in concern, and I think in some degree of disbelief. Despite all of the efforts of the Commission to explain, there is great confusion today, and I think this is particularly true among the rank and file, with respect to the issue of expressing your views on political opinion.

[13] The action before you today has been brought on behalf of one of the organizations of our Postal Workers. I have had postal carriers say to me, "What do I do when a housewife asks me if I have some opinion about this, that or the other kind of Government program?" This kind of confusion is not good.

There has been a long argument on whether members of carpools may stop at the polls and vote on their way in in the morning, or whether this contravenes the restrictions against carrying people to the polls. The question of serving as an officer at an election—is this to be mixed up as serving as a partisan watcher or checker. I could go on, sir. Is this sufficient?

JUDGE GESELL: Some of the papers suggest that because of the uncertainties such as you have been talking about, that there may be a tendency on the part of supervisors and others in the Government who are advising Federal employees, to speak in terms of the policy of the Act, and suggest abstention perhaps even beyond that, which the statute itself contemplates. In your experience is that likely, or has that happened?

THE WITNESS: That is likely, and it has happened. Again, there are many circumstances that I could cite. I have heard important officials of rather large Federal installations make speeches to their staff at the time of political campaigns that were far removed from the actual [14] prohibitions of the Act, and have attempted to tell them, "I may not be accurate in all of this"—I am putting this in quotes—"I may not be quite accurate in all of this, but I want you to know it is our policy for you people to stay clear of political involvement.

JUDGE GESELL: Do you have any questions?

MR. ANDERSON: I have no questions, your Honor.

JUDGE MACKINNON: Would you liken the confusion under

the Hatch Act to the confusion that probably exists under the Income Tax Act?

THE WITNESS: Well, the analogy is arresting, your Honor, and perhaps it can be likened in two respects. The difficulty of writing in clear precise words exactly what one may do and may not do—that is the first. The second, I think, runs really to the almost abnormal, but nevertheless a very real societal fear on the part of ordinary folks when they are confronted with difficult language. They tend to freeze, and to that extent we have the same kind of thing. There is not, of course,.the same degree of very major penalties, but there is still a degree of penalty.

JUDGE MACKINNON: Which doesn't have penalties?

THE WITNESS: I say there is not the same degree of penalty prescribed for minor violations of the Hatch Act as can be assessed against one for even rather minor violations of the Internal Revenue laws. But, I think the effect is very [15] much the same. It has a very real effect on people's sense of fear. To have the statute books say that you lose your job because of violation of the Hatch Act unless three Civil Service Commissioners by a unanimous vote decree a lesser period of suspension is a pretty severe penalty.

JUDGE MACKINNON: We are talking about confusion.

THE WITNESS: I think this tends to bring confusion. When there are either civil or criminal penalties, people tend to be confused about what they may and may not do for fear of the penalties that may be imposed.

JUDGE MACKINNON: It is much the same type of confusion that exists in the tax law.

THE WITNESS: Correct.

JUDGE MACKINNON: Now, as I read your affidavit, you, also in addition to running for local office, sort of, whether expressly or implicitly, sanction participation in electioneering.

THE WITNESS: Yes, I do.

JUDGE MACKINNON: Local electioneering.

THE WITNESS: Yes, I do.

JUDGE MACKINNON: Of course, that is for whom? All candidates, I presume.

THE WITNESS: Yes, sir. This is for Federal employees. You know, they are free to do this.

JUDGE MACKINNON: Now, that is a pretty open door, isn't it?

[16] THE WITNESS: It could be, but I do not believe that it is a door which would be open so wide as to engender a large amount of public adverse reaction, nor do I think that most Federal employees are so short of judgment that they would use this in such a way that their conduct exceeded the bounds of normal good will, and good faith, and proper decorum as a Federal employee.

JUDGE MACKINNON: Just take the potentialities of it, and I think that is what Congress probably had in mind, and you don't have to go any further than the parties before us here today, the Postal Service. Now, in one 24-hour period, every individual in America, composed of about 200 million people, can have their doorbell rung by a member of the Postal Service, is that right?

THE WITNESS: That is right.

JUDGE MACKINNON: Yes, sir. And, you don't think that the potentiality of that on a political basis has any ramifications?

THE WITNESS: I think it has ramifications, but I do not believe this is an example of what would be done or could be done, because I think the Federal employees are just more responsibile than to do that kind of thing.

JUDGE MACKINNON: Well, maybe they are, but suppose you only got 70 percent of them working, as they have a legitimate right to do, say, under your theory, for an increase in salary. They want people elected that are going to be more [17] favorable to their salaries. Now, that would be a perfectly legitimate reason why they could go out and campaign for a particular Congressman, right?

THE WITNESS: Yes.

JUDGE MACKINNON: Doesn't the characterization of that in those terms indicate to you that it is something that we can't have in this country?

THE WITNESS: It is something which I think we should, very frankly, your Honor, take a chance. I believe that the public reaction, the congressional reaction, the reaction of the employee organization, Union leaders, the reaction of the employees themselves would be so instantaneous against abuse of this privilege that it would not be abused.

JUDGE MACKINNON: You say you ought to give it to them because they wouldn't use it.

THE WITNESS: No, I don't say that. I say we ought to give it to them so it can be used with discretion and good judgment, just as a normal citizen, I believe, uses his political freedom of speech with discretion and good judgment. We have had so many cases. May I say a word further, your Honor. We have had so many cases in the Civil Service Commission, including a number when I had the privilege of being its Chairman, in which the basic issue was had this man or this Federal employee, man or woman, engaged in the management of political campaigns because he had signed a petition or let his [18] name be used in connection with supporting the candidacy of this, that or the other person. In almost no case that I recall was this action in any way that I could see it, a threat to the Federal Service or to me.

JUDGE GESELL: The question before us isn't the one, with all respect, that Judge MacKinnon is presenting. The question is, it seems to me, at least, much different. If that type of organized campaign by the postal workers is quite clearly contrary to what we think should be the standards, it can be prohibited. But, does that mean that you fire a Federal employee because she takes a sandwich to her husband, or that you fire a Federal employee because he wears a button.

THE WITNESS: I don't think so.

JUDGE GESELL: Or you fire a Federal employee because he signs a petition against smog emanating from a local utility. I thought the issue here was the breadth and vagueness of the statute, and not the question of whether Congress could properly, narrowly and with specificity prevent certain types of expression of political activity.

THE WITNESS: Reading indictments before the Court led me to exactly the same conclusion, sir.

JUDGE PARKER: I was interested in your comment on allegedly non-partisan activity. Are you saying in your judgment many of these non-partisan groups in effect become partisan and are in violation of the Act?

[19] THE WITNESS: They are not in violation of the Act in its own term, sir, but I am saying many non-partisan movements over a period of time in my judgment become just as partisan as movements that carry a party banner, a donkey or an elephant.

JUDGE GESELL: Your point is the statute permits that.

THE WITNESS: That is right.

JUDGE GESELL: But, doesn't permit it in the name of the donkey or the elephant.

THE WITNESS: That is right. It is a very difficult kind of thing here. Some state laws insist that you run on a partisan ticket even for local office. If a Federal employee runs for Board of Education on a partisan ticket, he is probably automatically in violation of the Act.

There are areas of confusion, and there are broad areas of disagreement in which men of perfectly good will can disagree.

JUDGE MACKINNON: Well, of course, running for a partisan office on a partisan ticket, when a person runs, he runs with others, and his particular prominence might have the effect of attracting people to that particular ticket, and so the whole party ticket benefits. That is really what is involved in that circumstance, isn't it? And, that is what they are concerned about in it, isn't it?

THE WITNESS: I would respectfully disagree that it [20] attains that importance. I do not believe it does in the kind of office that I have in mind.

JUDGE MACKINNON: Well, it is a matter that varies with elections. If you have a good party ticket for county commissioner, school board, register of deeds, Clerk of Court, these are the people that have the workers that go out and fan over the District, and they are the ones that work for the ticket. They vote for the ticket straight down the line. In advocating their own campaigns, they advocate the vote for the ticket.

JUDGE GESELL: Isn't the point, however, that you can do that under the Hatch Act.

JUDGE MACKINNON: No, it isn't.

JUDGE GESELL: You can do that under the Hatch Act, as I understand it, if you run on the ticket of the Topeka Citizens Association. The whole citizens association can be organized, and you can run all you want. And, it is only when you have, as I understand what the witness is saying, affiliation with a political party. A citizens association can be partisan is his point, I suppose. That is the differentiation you are talking about.

THE WITNESS: That is the differentation.

JUDGE GESELL: There is no prohibition against partisan participation. There is only prohibition against partisan participation in one of the political parties.

[21] THE WITNESS: Yes.

JUDGE MACKINNON: I come from a state where we have large non-partisan elections. We even elect legislators on a non-partisan basis, without any party designation. But, all local officers, all judges are elected on a non-partisan basis, so I know what you are talking about. I know how it operates.

THE WITNESS: Are they endorsed, your Honor.

JUDGE MACKINNON: Some of them are.

THE WITNESS: This is another thing that brings very difficult problems of interpretation under the act.

JUDGE MACKINNON: This has been a changing thing. One of the parties tried to interject or have tried for many years to interject their endorsements into the scheme. A couple of the other parties stayed out of it. Generally they have now been shifting to the position where more or less all parties in the Metropolitan areas try to interject their partisan endorsement in a non-partisan office, but out in the rural community, it is pretty much generally the way it has been for fifty years.

JUDGE GESELL: Nothing further. Thank you, sir.

(Witness leaving stand.)

[Reporter's Certificate Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

DECEMBER 11, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,
APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion and order of the three-judge district court (App. A, *infra*, pp. 1a–44a) is not yet reported.

JURISDICTION

The order of the three-judge district court declaring the statute unconstitutional and enjoining its enforcement was entered on July 31, 1972. A notice of appeal to this Court was filed on August 25, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether the prohibition of the Hatch Political Activity Act against federal employees taking "an active part in political management or in political campaigns" is unconstitutional on its face.

STATUTES AND REGULATIONS INVOLVED

The "Hatch Act," 5 U.S.C. 7324, provides:

> (a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—
>
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> (2) take an active part in political management or in political campaigns.
>
> For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.
>
> (b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.
>
> (c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a

recognized religious, philanthropic, or cultural organization.

(d) Subsection (a)(2) of this section does not apply to—

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

(4) the Commissioners of the District of Columbia; or

(5) the Recorder of Deeds of the District of Columbia.

The pertinent regulations of the Civil Service Commission, 5 C.F.R. 733.101, 733.111, 733.122, and 733.124, are set forth in Appendix B, *infra*, pp. 45a–49a.

STATEMENT

Appellees are a federal employees' postal union, certain individual federal employees, and local Democratic and Republican political committees. They brought this action in the district court challenging the constitutionality of the provision of the Hatch Act (5 U.S.C. 7324(a)(2)) that bars federal employees from taking an "active part in political management or in political campaigns." Alleging, *inter alia*, that the individual employees either had violated the Act and were threatened with its enforcement or de-

sired to engage in prohibited activities, the appellees sought a declaration that the Act is unconstitutional and an injunction against its enforcement. A three-judge district court, in a divided decision, held Section 7324(a)(2) invalid and enjoined its enforcement. It stayed its order pending appeal to this Court.[1]

The court recognized the "appropriateness of [the] governmental objective" of the Hatch Act (App. A, *infra*, p. 3a). The defect in the statute, the court held, was the definition of the expression "an active part in political management or in political campaigns" as meaning "those acts of political management or political campaigning which were prohibited [for federal employees] * * * before July 19, 1940, by determinations of the Civil Service Commission * * *." The court held that this definition required federal employees to consider, as a guide to their political conduct, the entire body of pre-1940 administrative rulings "rigidly incorporated" into the Act (*id.* at 9a). These rulings, according to the court, often proscribed constitutionally permissible conduct and were inconsistent with each other and with the language of the Hatch Act itself.

Although recognizing that "[t]he incorporated rulings were to serve generally as an upper limit on

[1] Because it found that the class of state employees administering federally funded programs was not adequately represented by the plaintiffs before it, the court below did not pass on the validity of the Hatch Act's restrictions against partisan political activities by such persons (5 U.S.C. 1501–1502). However, the reasons given by the court for invalidating the prohibitions relating to federal employees would appear to apply with equal force to state employees.

future interpretations or expansions of previously prohibited political activity * * *" (*id.* at 6a), the Court held that "no constitutionally accepted mechanism was provided for accomplishing this result" (*id.* at 6a–7a). It rejected the administrative gloss placed on the statute by the Commission's regulations and decisions, holding that Congress conferred no power on the Commission to clarify or define the statutory prohibition (*id.* at 7a, 9a). As a result, the court concluded that the statute was both overly broad and impermissibly vague, characterizing this as "a classic case of a statute which in its application has a 'chilling effect' unacceptable under the First Amendment" (*id.* at 11a).

The court recognized that this Court has upheld the constitutionality of the Hatch Act in *United Public Workers* v. *Mitchell,* 330 U.S. 75. It stated, however, that "the *Mitchell* opinion explicitly left open the question of the constitutionality of the incorporation-by-reference section of the Act" (*Id.* at 13a). Furthermore, even if *Mitchell's* holding were considered binding, the court characterized it as "inconsistent with subsequent decisions delineating First Amendment freedoms. These precedents, which developed the 'least restrictive alternative test' for governmental incursions into the area of free speech, undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based. The decisions, coupled with changes in the size and complexity of public service, place *Mitchell* among other decisions outmoded by passage of time" (*ibid.* footnote omitted).

Judge MacKinnon dissented. He concluded that the claim of overbreadth lacked validity because Section 7324(a)(2) did not incorporate all pre-1940 administrative decisions, but only those consistent with other provisions of the Act and with evolving concepts of First Amendment rights (*id.* at 33a). Pointing to the regulations promulgated by the Civil Service Commission (App. B, *infra*, pp. 45a–49a), which set forth in considerable detail the principal prohibited and permitted political activities, as well as to the Commission's practice of rendering advisory opinions on request, he concluded that the reasonable federal employee could ascertain with reasonable precision what constitutes prohibited political activity, and that the statute was thus "not impermissibly vague in the constitutional sense" (App. A, *infra*, pp. 42a–43a).

THE QUESTION IS SUBSTANTIAL

This appeal presents an important constitutional question, with far-reaching effect.

1. The Hatch Act provision struck down by the court below governs the political activities of nearly all federal employees, as well as employees of the District of Columbia. In addition, through 5 U.S.C. 1501–1502, its provisions are applicable to state employees administering federally funded programs. It reflects a policy that had been a cornerstone of the merit civil service system long before the enactment of the Hatch Act in 1939. This policy was embodied in Civil Service Rule I, first promulgated by the Civil Service Commission in 1883. While initially concerned with use of "official authority or influence to co-

erce * * * political action," as early as 1907 the rule was amended as follows:

> * * * Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, *shall take no active part in political management or in political campaigns.*[2] [Emphasis supplied.]

The emphasized language was adopted and codified by Congress in the Hatch Act and has continued to regulate the activities of federal employees to this date.

A decision of such sweeping and fundamental effect upon the federal civil service as the instant one, removing all restraints on partisan political activity by federal employees, requires review by this Court.

2. This Court upheld the constitutionality of the Hatch Act's restrictions on active political management and political campaigning in *United Public Workers* v. *Mitchell,* 330 U.S. 75 (with respect to federal employees), and *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127 (with respect to state employees administering federally funded programs).

In *Mitchell,* the Court declared that Congress has the power to control actions which in its judgment "menace the integrity and the competency of the [civil] service." 330 U.S. at 103. The Congress, it stated, could reasonably conclude that government em-

[2] This history is reviewed and the quoted regulations are set forth in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 79–80, n. 4.

ployees who are active in partisan politics constitute a "danger to the [civil] service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections." *Id.* at 98. Aware of earlier periods in our history when there was little if any delineation between government employment and partisan politics, the Court further noted that Congress could properly have found that "government employees are handy elements for leaders in political policy to use in building a political machine" (*id.* at 101). The Court consequently held that the restrictions of the Hatch Act constituted a reasonable condition upon governmental employment.

The conclusion was reiterated in *Oklahoma* v. *Civil Service Commission, supra,* where the Court emphasized that "[t]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partianship." 330 U.S. at 143.

Since those decisions, many lower courts have upheld the Hatch Act's prohibitions against challenges of every variety, including the contentions adopted by the court below, and this Court has consistently denied review of such decisions. See, *e.g., Northern Virginia Regional Park Authority* v. *Civil Service Commission,* 437 F. 2d 1346 (C.A. 4), certiorari denied, 403 U.S. 936; *Kearney* v. *Macy,* 409 F. 2d 847 (C.A. 9), certiorari denied, 397 U.S. 943; *Engelhardt* v. *Civil Service Commission,* 304 F. 2d 882 (C.A. 5); *Palmer* v. *Civil Service Commission,* 297 F. 2d 450 (C.A. 7), certiorari denied, 369 U.S.

849; *Fishkin* v. *Civil Service Commission*, 309 F. Supp. 40 (N.D. Cal.), appeal dismissed under Rule 13, 396 U.S. 278.[8]

The court below was of the view that *Mitchell* is not controlling because it did not decide the claims of overbreadth and vagueness on which the present finding of unconstitutionality rests. While these contentions were not explored in the Court's opinion in *Mitchell*, the complaint in that case did specifically challenge the statute on vagueness grounds, 330 U.S. at 83, n.12, and the Court upheld the constitutionality of the provision in the face of a dissent by Mr. Justice Black articulating the very contentions of overbreadth and vagueness relied upon by the district court in the instant case. *Id.* at 105, 110. Thus, it can fairly be said that the decision below conflicts with a controlling decision of this Court.

3. In view of the manifest importance of the issue, little need be said regarding the merits of the case. We disagree with the lower court's characterization of the *Mitchell* and *Oklahoma* cases as "outmoded by passage of time" (App. A, *infra*, p. 13a). On the contrary, in view of (1) the admitted appropriateness of the governmental objective embodied in the provision in question (*id.* at 2a), (2) the impracticality of requiring Congress to delineate in the statute every specific form of conduct that it sought to prohibit, and

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[8] The only cases cited in support of the district court's decision, *Hobbs* v. *Thompson*, 448 F. 2d 456 (C.A. 5), and *Mancuso* v. *Taft*, 341 F. Supp. 574 (D. R.I.), involve state laws that, as stated in *Hobbs*, go "far beyond the Hatch Act provisions approved * * * by the Supreme Court." 448 F. 2d at 471.

(3) the existence of clear and reasonable regulations of the Civil Service Commission, reflecting a careful balancing of the competing interests of the government in maintaining a non-political civil service and of the employee in having the fullest measure of freedom consistent with that objective, the Hatch Act is no less constitutional today than it was 25 years ago, when the landmark cases were decided.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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OCTOBER 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Civil Action No. 577-71)

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL., PLAINTIFFS

v.

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., DEFENDANTS

Before MACKINNON, Circuit Judge; GESELL, District Judge; PARKER, District Judge.

OPINION AND ORDER

[July 31, 1972]

GESELL, District Judge: The National Association of Letter Carriers and six federal employees have brought this class action on behalf of all federal employees seeking a declaratory judgment that 5 U.S.C. § 7324(a)(2), the provision of the so-called Hatch Act which prohibits certain federal employees from taking "an active part in political management or in political campaigns," is unconstitutional.[1] In urging

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[1] The National Association of Letter Carriers and six federal employees are adequate representatives of the class of all *federal* employees affected by the Hatch Act, and this particular class is thus certified under Rules 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure. On the other hand, six local area Democratic and Republican political committees were also joined as plaintiffs and seek to broaden the scope of

that enforcement of the challenged provisions be enjoined, plaintiffs assert that the Act is vague, overly broad, and in conflict with the First Amendment to the Constitution of the United States. Defendants are the Civil Service Commission, its three members, and the Secretary of Health, Education and Welfare. Finding the question substantial in the light of current constitutional doctrine, this three-judge court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. A voluminous record was developed by stipulation, some testimony was taken, and the issues have been fully briefed and argued.

There is an obvious, well-established governmental interest in restricting political activities by federal employees which was asserted long before enactment of the Hatch Act. Many federal employees have been prevented from running for political office and engaging in the more obvious forms of partisan political activity since the passage of the Civil Service Act in 1883.[2]

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this action to challenge 5 U.S.C. §§ 1502(a)(3) and 1501(5) which impose identical restrictions on certain categories of *state* employees. None of the individual plaintiffs or the National Association of Letter Carriers, however, can properly represent the interests of *state* employees under the requirements of Rule 23(a) of the Federal Rules of Civil Procedure, and the record does not establish that the six political committee plaintiffs have within their membership a sufficiently broadly based representation of all *state* employees adequately to protect the diverse and varying interests of state employees covered by § 1502(a)(3). Accordingly, this case will be considered only as it directs a challenge to the restrictions on *federal* employees, 5 U.S.C. § 7324.

[2] Since passage of the Civil Service Act in 1883, various Presidents, starting with President Arthur, issued executive rules listing restrictions on governmental employees in the federal competitive service which were enforced by the Civil Service Commission. In 1907, President Roosevelt increased the re-

The Hatch Act provides in pertinent part that any employee of an Executive agency or an employee of the District of Columbia may not take an active part in political management or political campaigns of a partisan nature and is subject to removal or suspension without pay for violation. The appropriateness of this governmental objective was recognized by the Supreme Court of the United States when it endorsed the objectives of the Hatch Act. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *cf. Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947).

A narrower issue, however, is presented here which was specifically left unresolved by *Mitchell.*[3] This litigation focuses not on the merits of the objective of

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strictions and required stricter compliance. The Hatch Act, enacted August 2, 1939, ch. 410, 53 Stat. 1147–49, and significantly amended, July 19, 1940, ch. 640, 54 Stat. 767–72, extended the same restrictions, with some exceptions, to all employees in the Executive Department of the Federal Government, all employees of the government of the District of Columbia, and all employees of state or local agencies "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal Agency. . . ." 5 U.S.C. §§ 1501(4), 1502, and 7324. *See* 1 *United States Civil Service Commission Political Activity Reporter* Introduction (1971) [hereafter cited as P.A.R.]; Rose, *A Critical Look at the Hatch Act*, 75 Harv. Rev. 510 (1962).

[3] Justice Reed, speaking for the majority in *Mitchell*, stated:

We need to examine no further *at this time* into the validity of the definition of political activity and § 15. 330 U.S. at 103–104 (emphasis added; footnote omitted).

And Justice Black in his dissent stated that:

Furthermore what federal employees can or cannot do, consistently with the various civil service regulations, rules, warnings, etc., is a matter of so great uncertainty that no person can even make an intelligent guess. *Id.* at 110.

the Hatch Act but on the manner in which Congress defined the conduct it purported to prohibit in the name of "political management or political campaigns." The meaning and effect of the prohibitions measured against First Amendment standards is now properly raised by qualified plaintiffs having a direct interest as a class in the matter, and this admittedly troublesome constitutional issue can no longer be avoided.

Section 15 of the Act here challenged provides:

> . . . the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under rules prescribed by the President. § 7324(a).

This definition is ambiguous and unsatisfactory. It incorporates by reference over 3,000 rulings made by the Commission between 1886 and 1940. These rulings, which were not before the Congress when the Act was passed, have now been assembled and are in the record of this case.[4] When examined they have a sweep and indefiniteness that no one would even attempt in these days to defend if analyzed against the strictures of the First Amendment. A few examples suffice to make this apparent. Disciplinary action was taken against federal employees in situations where the employee engaged to some extent in the following:

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[4] These incorporated rulings vary from lists of penalized employees, to vague, generic descriptions of the political activity engaged in, to lengthy, narrative descriptions of the activities with a discussion at the end of the penalty received. The complete compilation of these rulings was introduced into the record in this case. For a general index of these rulings, see 1 P.A.R. iii–xxvi (1971).

(1) made a wager on an election;
(2) offensively discussed a "political question";
(3) disparaged the President;
(4) denounced a political party while in a jovial mood due to alcohol;
(5) publicly engaged in a political discussion;
(6) wrote a political letter;
(7) publicly expressed a political opinion;
(8) published a political article;
(9) wore a political button while on duty;
(10) stated unsubstantiated facts about ancestry of a candidate;
(11) made offensive political remarks;
(12) failed to discourage a spouse's political activity;
(13) stated disapproval of treatment of veterans while acting as a Legion officer in a closed Legion meeting;
(14) was partisan in political views;
(15) allowed one's name to be associated with an objectionable political affair;
(16) authored an anonymous political communication.[5]

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[5] For specific examples of the categories listed above (using the notation system suggested in 1 P.A.R. i and ii (1971), and with reference to the index, *id.* at iii–xxvi) *see:*
(1) Index #63, Atkins, 31 AR 160;
(2) Index #24, Hiner, 32 AR 141;
(3) Index #24, Dunham, 32 AR 144;
(4) Index #24, Brock, 31 AR 146;
(5) Index #24, Mure, 34 AR 148;
(6) Index #64, Cain, 32 AR 143;
(7) Index #24, Chester, 32 AR 143;
(8) Index #51, Nihart, 32 AR 143;
(9) Index #7, Ratcliffe, 34 AR 144;
(10) Index #54, Smith, 1922 Min. 343;
(11) Index #24, Edmonds, 33 AR 151;
(12) Index #17, Brock, 1935 Min. 209;
(13) Index #25, Davis, 1935 Min. 154;
(14) Index #24, Castleberry, 32 AR 145;
(15) Index #35, Woody, 1933 Min. 670;
(16) Index #9, MacDonald, 1933 Min. 293.

As if conscious of the latent overbreadth and vagueness of the rulings which were never disclosed in hearings, committee reports or debates, the Act contains a significant qualifying provision which states, "An employee . . . retains the right to vote as he chooses and to express his opinion on political subjects and candidates." 5 U.S.C. § 7324(b). It is immediately unclear how the incorporation by reference and this qualifying provision were intended to operate together. At first glance they appear mutually contradictory. One fixes the definition and the other makes the definition fluid.

The incorporation of prior rulings seems to have been intended in part to serve as a brake on any possible expansion of the meaning of the phrase "an active part in political management or in political campaigns" beyond what was generally understood by that phrase under Commission interpretations as of 1940.* The incorporated rulings were to serve generally as an upper limit on future interpretations or expansions of previously prohibited political activity. The qualifying provision in section 7324(b) indicates that they were subject to being cut back or modified in some indefinite way more consistent with the First Amendment "rights" of expression.

The difficulty, however, is that no constitutionally acceptable mechanism was provided for accomplishing

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*Section 15 of the Act, as reported out of committee, would have granted rulemaking power to the Commission, but after two weeks of debate, Senator Hatch substituted the provision that was enacted as a floor amendment. The final version was offered at 86 Cong. Rec. 2947 (Mar. 15, 1940). During the debate on the substituted final version, Senator Hatch said that "it seemed to me to be very wise not to give the Commission any more power to interpret further in the future." *Id.* at 2949. *See id.* at 2937–50; 84 Cong. Rec. 9621–9674 (1939); and Rose, *A Critical Look at the Hatch Act*, *supra* note 2.

this result. Grave ambiguities remain. The defect lies not in the basic underlying purpose to limit certain partisan political activities by federal employees but rather in its drafting. Prohibitions are worded in generalities that lack precision. There is no standard. No one can read the Act and ascertain what it prohibits.[7] Neither the Commission nor any other agency was given rulemaking power. Indeed even those most intimately concerned with its enforcement are in doubt and have sought legislative clarification.[8]

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[7] At several points in the Senate debates it was emphatically pointed out that none of the Senators knew what the incorporated rulings said. 86 Cong. Rec. 2940 (remarks of Senator Minton: "No one on the floor of the Senate, not even the Senator from New Mexico [Senator Hatch], now knows what these rules and regulations are."); *id.* at 2947 (remarks of Senator Brown: "I say it is very careless legislation in effect to write into statute law 62 pages of civil-service rules and interpretations by the Civil Service Commission, without knowing what we are doing.").

[8] "Conditions have changed since 1940. The prohibitions imposed prior to that time may not all be valid in light of present circumstances.

"In essence, notwithstanding the present qualifying provision, the present language is somewhat broad and somewhat uncertain. It is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency or integrity of the civil service as to justify the infringement of individual political rights. It is uncertain in that it fails to define with clarity and precision the types of activities which are prohibited." Statement of John W. Macy, Jr., Chairman, United States Civil Service Commission, before Commission on Political Activity of Government Personnel (CPA) on May 15, 1967, 3 CPA, Report, at 15 (1968). Chairman Macy was accompanied during this testimony by the other two members of the Civil Service Commission and its General Counsel, and at that time the present Chairman expressly endorsed Chairman Macy's statement on behalf of the Commission. *Id.* at 24.

The Commission recently sponsored a three-volume work called the *Political Activities Reporter* (P.A.R.) which catalogues in commendable detail the rulings made under the Act since 1940. Analysis of these rulings shows that the Commission has generally ignored many of its pre-1940 rulings where questioned conduct appears to involve only opinion. Expressions of political opinion have been permitted except when the circumstances shown in a particular disciplinary action support a finding that an opinion on a political question was expressed by the employee with the intent of influencing others.[9] However, putting aside the fact that enforcement of any pre-1940 rulings still remains a threat, the administrative actions of the Civil Service Commission, even if unqualifiedly accepted as the administrative gloss on the Act, still place any federal employee at hazard if he ventures to speak on a political matter since he will not know when his words or acts relating to political subjects will offend.

If he writes a letter to a newspaper seeking support for a program endorsed by a political party, such as pollution control, does he intend to influence? How many people can see or hear what he writes or says before an intent to influence by his opinion will be found? Can he respond to a pollster? Can he attend a political rally and sit on the platform where his

[9] *See generally* Commission rulings in 3 P.A.R. Digest (1971), under Digest Nos. 268–270. Two such rulings were Watson, 1 P.A.R. F–1221–48, in which the Digest entry is "Where employee expresses opinions on political subjects or candidates in order to influence actions of voters, such expressions of opinion constitute 'campaigning' within the meaning of the Act," and Wilson, *id.* at F–1530–55, in which the entry is "Test of whether statement is permitted 'expression of opinion, is whether there is a mere expression of opinion, or whether there is a premeditated effort to influence political actions by others."

presence will be noted? If he is a member of a Union, a PTA, or a fraternal lodge, can he urge the organization to pass a resolution on a political issue? Can he appear on a television panel to discuss a question that for many may have political import? What issues are, after all, political in a campaign year—China, crime in the streets, inflation, foreign aid, national debt? Does intent to influence appear more likely depending on his pay grade, on his title, or on to whom he talks?

Confusion and uncertainty persist under this intent-to-influence formula. Any conscientious public servant concerned for the security of his job and conscious of the latent power in his supervisor to discipline him if he transgresses into areas of questioned conduct must feel continuously in doubt as to what he can do or say politically. The result is unacceptable when measured by the need to eliminate vagueness and overbreadth in the sensitive area of free expression.

The Civil Service Commission has acted responsibly in attempting the impossible task of applying the uncertain and conflicting provisions of the Act. Its efforts, however, were thwarted by the fact that it was given no authority under the Act to accommodate rigidly incorporated prior rulings to the rapidly evolving court interpretations of the First Amendment and the basic inconsistency between prior rulings and, interpretations of the constitutional right to state opinion still persists. Congress not only gave insufficient standards but also withheld the authority essential to enable the Commission to create essential clarity out of the general, imprecise prohibition enacted.

The Act is capable of sweeping and uneven application. It is of no consequence that particular prior rulings may be partly ignored by those presently

charged with enforcement. Conscientious public servants may still lean over backwards to abide by these dormant rulings, and, in any event, no one can say to what extent interpretations of the Constitution have changed them.[10] Nor is it an answer, as the defendants feebly suggest, that people of common intelligence know what is comprehended by active and partisan political activity. Uncertainties abound and they will produce excessive caution and stifle words and acts not explicitly prohibited. Small wonder that even those concerned with enforcement share the sense of uncertainty and confusion, as the record before us attests.[11] Thus do generalized, vague prohibitions become misunderstood and misapplied and serve to limit expression by millions of Federal Government employees, and even their families, in a society where political speech and uninhibited, robust, wide-open debate on public issues are at the essence of self-government.

Ours is not a form of government that will prosper if citizens, particularly Federal Government servants, must live by the mottoes "better be safe than sorry" and "don't stick your neck out." Government employment should, of course, carry some well-defined limitations upon participation in partisan political matters, but Congress may not by reason of this desirable objective neutralize such a large segment of the populace from expressing any opinion on any "political" issue with the intent of somehow influencing someone else. In the end everything may appear political, all speech may intend to influence, and conformity is imposed in the fashion of more regimented, less democratic governments.

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[10] *Cf.* Keyishian v. Board of Regents, 385 U.S. 589, 599–602 (1967).

[11] *See* note 8, *supra*.

This is a classic case of a statute which in its application has a "chilling effect" unacceptable under the First Amendment. The use of a shorthand expression such as this in legal terminology sometimes tends to obfuscate the significance of the underlying principle. Commencing around 1940 in a series of important First Amendment cases, the Supreme Court evolved the "chilling effect" doctrine to deal with the vice of overbreadth and attendant vagueness in legislation limiting speech such as that so obviously presented here.[12] It declared that men of common intelligence must not be made to guess at the meaning of a statute affecting these rights. Some activities involving speech and association may be regulated where a proper governmental purpose and definite need is demonstrated. This interference with privileged conduct must be carefully and narrowly drawn. Executive agency employees as citizens are entitled to be specifically informed as to what the Congress intends to forbid.[13] Restrictions may not be achieved by means which sweep unnecessarily broadly into the First Amendment areas.[14] The right and privilege of expression and association cannot be so unnecessarily invaded that the use is dampened and discouraged. To chill

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[12] Within the past month, the U.S. Supreme Court in Grayned v. City of Rockford, 40 U.S.L.W. 4881 (June 26, 1972), succinctly summarized the reach and scope of both the doctrine of vagueness and overbreadth. For a more lengthy discussion of the doctrine of overbreadth, vagueness and chilling effect, *see* Hobbs v. Thompson, 448 F.2d 456, 459-460 (5th Cir. 1971), and cases cited therein.

[13] Grayned v. City of Rockford, 40 U.S.L.W. 4881 (June 26, 1972); Papachirston v. City of Jacksonville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[14] Grayned v. City of Rockford, 40 U.S.L.W. 4881 (June 26, 1972); United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963).

is to despirit, and the First Amendment will not flourish but can be gradually suffocated in such an atmosphere.

The Supreme Court of the United States has left no doubt on this score:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," . . . "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterance may lose ~~him~~ his position, one necessarily will "steer far wider of the unlawful zone. . . ." . . . For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. . . . *Keyishian* v. *Board of Regents of the University of the State of New York,* 385 U.S. 589 at 603–604 (1967).

No less can be said of Federal Government employees.

The record before this Court emphasizes the growing reach of this Hatch Act legislation which, with the expansion of federal grants to various state services, now encompasses millions of Federal Government employees and their families. It is now obvious that whatever may have been the validity of the Hatch Act in 1940, it cannot as presently interpreted withstand constitutional challenge under contemporary interpretations of the First Amendment.

Two courts have already recognized the necessity of re-examining the Act in the light of controlling prece-

dents. *Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir. 1971); *Mancuso* v. *Taft*, 341 F. Supp. 574 (D.R.I. 1972).[15]

Defendants urge that *Mitchell* is binding. As indicated above, this does not appear to be the case since the *Mitchell* opinion explicitly left open the question of the constitutionality of the incorporation-by-reference section of the Act. However, even if *Mitchell's* holding is considered binding, as the defendants contend, it is inconsistent with subsequent decisions delineating First Amendment freedoms. These precedents, which developed the "least restrictive alternative test" for governmental incursions into the area of free speech, undercut the "rational basis" test upon which the *Mitchell* analysis of the Hatch Act was based.[16] The decisions, coupled with changes in the size and complexity of public service, place *Mitchell* among other decisions outmoded by passage of time.

It is difficult to declare a statute long on the books and so well motivated unconstitutional. The arguments advanced by the dissent, however, are not persuasive. In the delicate, precious area of free speech, the obligation of the courts to seek all possible, even if somewhat tortured, means to uphold admittedly fuzzy congressional action must give way to other considerations.

If the Congress undertakes to circumscribe speech, it cannot pass an act which, like this one, talks in riddles, prohibiting in one breath what it may be

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[15] *Contra*, Northern Va. Reg. Pk. Auth. v. United States Civ. Serv. Com., 437 F.2d 1346 (4th Cir.), *cert. denied*, 403 U.S. 936 (1971), and the four cases cited therein at 1351. *See also* Broadrick v. Oklahoma *ex rel.* Okla. Person. Bd., 338 F. Supp. 711 (N.D. Okla., 1972).

[16] Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972).

argued to have allowed in another, leaving the citizen unguided but at hazard for his job. Perhaps details could have been left to the administrative discretion, but in this instance the Commission was given no rulemaking power, and the Act itself does not state with any precision what evils it seeks to prevent. Where speech is to be limited, it is no answer, as the dissent suggests, to imply that a reading of the voluminous *Political Activities Reporter* and resort to advisory rulings by the Civil Service Commission will give one who wants to express himself adequate guidance. Speech must not be controlled and subject to censure so that one cannot respond without prior clearance to the demands of free expression in ordinary daily affairs. If there are impermissible areas of activity, the overriding governmental interest must be marked with utmost clarity by the Congress in a form that is obvious to the sophisticated and unsophisticated alike.[17]

Accordingly, the Court declares 5 U.S.C. § 7324 (a)(2) of the Hatch Act unconstitutional in that its provisions are impermissibly vague and overbroad when measured against the requirements of the First Amendment to the Constitution. The injunction against enforcement is granted and a stay of this Order is granted pending determination by the Supreme Court of the United States. So ordered.

GERHARD A. GESELL,
United States District Judge.

Judge Parker concurs in this opinion and reserves the right to file a separate concurring opinion.

July 31, 1972.

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[17] *See* cases cited notes 13 and 14 *supra*.

MacKinnon, Circuit Judge, dissenting: This case is brought by the National Association of Letter Carriers, six local Democratic and Republican Committees, and six individually named federal employees [1] as a class action on behalf of all federal and state employees covered by the political management and campaigning provisions of the Hatch Act.[2] They seek a declaratory judgment that because Section 15 of the

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[1] The political committee plaintiffs are the Democratic Committees of Arlington and Fairfax Counties in Virginia and Montgomery and Prince Georges Counties in Maryland, the District of Columbia Democratic Central Committee, and the Republican Central Committee for Montgomery County, Maryland. The individual plaintiffs are J. Price Gee and Charles O. Myers, both letter carriers in the United States Postal Service and members of the plaintiff Union; John O. Hummel, an executive officer in the Internal Revenue Service and a resident of Arlington, Virginia; Frank Mandicino, Jr., an Assistant Regional Field Director in the U.S. Postal Service and a member of the Executive Board of the plaintiff Union; Marie Pinho, a Systems Analyst in the National Library of Medicine and an aspirant to the post of precinct Committee Woman in the plaintiff Arlington County Democratic Committee; and Ronald J. Wylie, Director, Political and Legal Analysis Branch, National Center for Health Services Research and Development, Department of Health, Education and Welfare, and a resident of Montgomery County, Maryland and aspirant to the Republican nomination to the Maryland State Senate. I find that Mandicino, Wylie and Myers each present a case or controversy and give us jurisdiction. The claims presented by Gee and Pinho are less immediate. I find that Hummel does not present a case or controversy.

[2] Originally enacted August 2, 1939, ch. 410, 53 Stat. 1147–49, the Hatch Act was amended significantly on July 19, 1940, ch. 640, 54 Stat. 767–72. The various provisions of the Act have since been incorporated at scattered locations in Title 5, United States Code, and were enacted into positive law in that form upon the formal codification of Title 5 by Pub. L. 89–554, § 1, September 6, 1966, 80 Stat. 378, *et seq.*

Act,[3] defining the prohibited activity of "taking an active part in political management or in political campaigns," is unconstitutional for overbreadth and vagueness, the prohibitions of such activities are themselves constitutionally invalid.[4] They also seek to en-

[3] Section 15 was added by the 1940 amendments to the Act, 54 Stat. 771, and provided:

The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

In this form Section 15 applied to both federal employees and to those state employees brought within the coverage of the Act by the 1940 amendment.

As it is now codified, the former Section 15 appears both as 5 U.S.C. § 1901(5) (1970), applying to covered state employees, and as the last sentence of 5 U.S.C. § 7324(a)(2) (1970), applying to federal employees. The operative language of both sections is the same:

the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

[4] Thus, their prayer for relief asks that: "This Court declare the provisions of law 5 U.S.C. 1502(a)(3) and 7324(a)(2) to be unconstitutional, invalid and void . . . ." Complaint, at 13. The first of these sections is the statutory prohibition as it applies to state employees:

(a) A State or local officer or employee may not—

* * * * * * *

(3) take an active part in political management or in political campaigns.

The second contains both the prohibition and the definition, but

join the United States Civil Service Commission and its individual members, and the Secretary of Health, Education and Welfare, from enforcing or threatening to enforce the challenged portions of the Act.[5] This three-judge court was convened pursuant to 28 U.S.C. §§ 2282 & 2284 to hear the case. After consideration of a voluminous documentary record and after hearing oral argument from the parties, it is my opinion that there is no constitutional defect in the challenged statutes.

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construing the complaint so that the two requests are consistent with one another we consider that it is the prohibition that plainiffs seek to have declared invalid:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

* * * * * * *

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

[5] In what must surely have been a typographical error the complaint requests injunctive relief against the enforcement of *all* of § 1502(a): "That each and all of the defendants be preliminarily and permanently enjoined from enforcing or executing or threatening enforcement of [*sic*] execution of the provisions of 5 U.S.C. 1502(a) [*sic*] and 7324(a)(2) . . . ." Complaint, at 14. This, too, we construe consistently with the prayer for declaratory relief to intend a request to enjoin enforcement of only § 1502(a)(3) and the prohibition portion of § 7324(a)(2).

I

At the outset it is noted that the two statutes the complaint here asks us to invalidate, 5 U.S.C. §§ 7324 (a)(2) and 1502 (a)(3), are respectively, the direct successors of Sections 9 and 12 of the Hatch Act (as amended in 1940). These two provisions were found to be constitutionally valid by the Supreme Court in *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947), respectively. In those cases essentially all the same issues here presented were decided adversely to the present opponents of the Act. In addition, in the intervening years the number of Government employees has materially increased and thus the threat to a democratic society and to an efficient public service has increased proportionately. It is accordingly beyond the power of this court to consider the plaintiffs' challenge to the constitutionality of the statutory prohibitions against "taking an active part in political management or in political campaigns."

However, despite the apparent specificity of the complaint, it has been clear throughout this litigation that the plaintiffs concede the validity of the governmental interest in prohibiting certain blatant forms of electioneering and politicking on the part of federal and state employees. Their concern, rather, has been with the scope of the prohibition as reflected by Section 15's definition of prohibited activities. They contend that since the Court in *Mitchell* found that Mr. Poole's actions fell squarely within the reach of Section 9, they expressly declined to examine the constitutional limits of the Section 15 definition of prohibited political activity,[6] and that this issue is open.

[6] 330 U.S. at 103–104: "We need to examine no further at this time into the validity of the definition of political activity

This overlooks the fact that the majority opinion in *Mitchell, supra,* which sought injunctive and declaratory relief, generally upheld the Act against the contentions raised after discussing the background and reasons for its enactment:

> The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

330 U.S. at 103. In addition the opinion held that the specific provisions which circumscribed Poole's (the plaintiff-employee) conduct were valid. This portion of the opinion also implicitly upheld the *manner* in which specific prohibitions against certain employee activities had been promulgated through Form 1236, September, 1939.

However, plaintiffs contend that the validity of the definition in Section 15 was left open for decision by the *Mitchell* and *Oklahoma* cases, and it is solely to consider plaintiffs' challenge to that definition that we have retained jurisdiction as a three-judge court over this case.

II

Federal Rule of Civil Procedure 23(c) requires consideration of the class aspects of the complaint. Plaintiffs assert that the class they represent is "all federal and state employees covered by [5 U.S.C. §§ 1502(a)(3) and 7324(a)(2)] who presently desire or will in the future desire to engage in activities which are or may be in violation of said provisions." Complaint, ¶ 14. This claim to representation is far too broad.

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and § 15." Mr. Paris' chairmanship of the Democratic State Central Committee, in the *Oklahoma* case, was even more obviously in violation of Section 12 than Mr. Poole's activities, so that the Section 15 definition was not even remotely under attack in that case.

I do not find that the class of state employees is properly represented by these plaintiffs. To begin, no member of this class is before the court. None of the named individuals is a state employee. The National Association of Letter Carriers represents only federally employed Postal Service workers. Only the political committees have even a plausible claim for representation of state employees. I thus consider this claim to be too remote to meet the requirements of Rule 23(a). Examination of the committees' allegation of injury in the complaint[7] reveals that their interest in this litigation is purely an institutional interest—they allege that their organizations are deprived of the services of governmental employees as potential candidates, party workers, and financial contributors. Though there is no question that the committees are entitled to participate in this action on their own behalf,[8] it seems clear to me that their

[7] Paragraph 19 of the Complaint alleges:

Plaintiff Democratic and Republican Committees have been and continue to be severely and adversely affected and disadvantaged by the enforcement and threats of enforcement of the political management and political campaigning provision of the Hatch Act against federal and state employees. In particular, Plaintiff Committees have been deterred and continue to be deterred from seeking desirable candidates who are Federal or state employees covered by the Hatch Act to run on the Democratic or Republican ticket for state and local offices. In addition, numerous individuals who would otherwise desire and be available to become members of Plaintiff Committees have been and continue to be deterred from doing so by said provisions of the Hatch Act. The general atmosphere of superstition and fear created by the political management and political campaigning provision of the Hatch Act has severely hindered Plaintiff Committees in their important responsibilities for fund raising and getting out the vote by deterring individuals from participating in political activities of any kind, including political donations and voting.

[8] *See, e.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 157–60 (1951) (Frankfurter, J., concurring).

interest in this litigation is separate and distinct from the individual employees' allegations of infringement of their First Amendment rights to freedom of expression of political views. Thus it is not clear that, in the terms of Rule 23(a)(4), "the representative [committees] will fairly and adequately protect the interests of the class [of state employees]." Furthermore, though the legal theories that would entitle the committees to relief are in many respects likely to be the same as would be argued by individual state employees or an organization whose membership or other status was more directly representative of that class, it is not readily apparent that the Rule 23(a)(3) requirement that "the claims . . . of the representative [committees] are typical of the claims . . . of the class" has been met here. Since the committees do not meet these requirements, and since no other plaintiffs claim to represent the class, I find that the case cannot be maintained as a class action with regard to the class of state employees covered by the Hatch Act.*

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*Since the statutory language applicable to state and federal employees is identical, why, it might be asked, aren't the federal employee representatives adequate representatives of the class of state employees despite their failure to so allege in the complaint? Though *Mitchell* and *Oklahoma* are dispositive on the question of the constitutional propriety of the governmental interest in prohibiting political activity on the part of both state and federal employees, what is present here is a challenge to the scope of that prohibition as reflected by the statute's definition of the prohibited activity. It is conceded that any regulation in this area infringes on First Amendment rights, so that the validity of the prohibition depends in large part on the Government's showing a compelling necessity for the statute. It seems at least feasible to me that the interest of the Federal Government in regulating in this area might differ with respect to federal and state employees—that the Federal interest in maintaining "the effeciveness, integrity and impartiality of the Fed-

As to the class of all federal employees covered by the Hatch Act, I find that a class action is properly maintainable here. Though there are but a few individuals and one union (with approximately 200,000 postal employee-members) representing the nearly 2.9 million civilian employees of the Federal Government, most of whom are covered by the Act, there is not present the potential conflicts of representational interest noted with regard to state employees. *See* note 9, *supra,* and accompanying text. The requirements of Rule 23(a) are thus fully met by these representatives. The defendant Civil Service Commission has admitted that it has enforced and will continue to enforce the provisions of the Hatch Act, including the political management and campaigning provisions, against those employees subject to its terms. Answer, ¶¶ 16, 17. This admission meets the requirements of Rule 23(b)(2), thus completing the Rule's pre-requisites for maintenance of a class action.

III

It is my finding, however, that this case is maintainable as a class action only with regard to the class of federal employees subject to the Hatch Act. My reason for denying class status to the parties seeking to represent state employees was my concern that those parties' interests are not closely enough aligned with

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eral Civil Service" (Defendants closing brief, at 6) might justify a prohibition broader in scope than the Federal interest in regulating those individuals within a state or local governmental unit's Civil Service whose positions are funded principally by Federal payments. While I intend to express no opinion on this subject here, I consider the possibility of such an argument to be a convincing reason for insisting that the state employees' interests be presented by a more representative individual or group than these federal employees and the Letter Carriers union.

the prospective class members' interests to provide adequate representation. Therefore I limit my inquiry in this action to examining the constitutional validity of the definition of that political activity prohibited to federal employees in 5 U.S.C. § 7324(a)(2). Plaintiffs challenge this definition on grounds of overbreadth and vagueness, and though these concepts are closely related they are sufficiently distinct to warrant separate analysis.

A. Overbreadth

The essence of the concept of overbreadth is that the challenged statute includes within its prohibitions both legal and illegal activity.[10] Overbreadth contentions are frequently combined, as here, with allegations of First Amendment violations—that the statute's overbreadth consists of prohibiting, *inter alia*, activities protected by the First Amendment. Here, plaintiffs argue that by incorporating the Civil Service Commission's pre-1940 decisions interpreting and applying the Commission's rule prohibiting political management and campaigning, the statute defines as impermissible many such political activities that fall squarely within the First Amendment's guarantee of "the opportunity for free political discussion . . . an opportunity essential to the security of the Republic, [and] a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).[11]

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[10] *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971); Street v. New York, 394 U.S. 576 (1969); United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[11] *See* Roth v. United States, 354 U.S. 476, 484 (1957): "The protection gives speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political

The critical assumption underlying the plaintiffs' argument is that in enacting Section 15 Congress intended to immutably fix the definition of prohibited political activity as those acts which the Commission, in their decisions and interpretations prior to 1940, had found violative of former Civil Service rules. Plaintiffs contend that some of these prior determinations would violate current concepts of the First Amendment's protections,[12] and that their incorporation into the statute's definition of prohibited activity is fatally defective to the entire definition.

With this assumption plaintiffs seek to compel a rigidity in Section 15's definition analogous to the laws of the Medes and Persians. This rigid literalness has no place in the interpretation of statutes and has long since and continuously been rejected by our Supreme Court.

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

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and social changes desired by the people."; New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964): "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."; Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

[12] *See* Affidavit of Anthony L. Mondello, General Counsel, United States Civil Service Commission, at 3–4 (hereafter cited as Mondello affidavit).

Holy Trinity Church v. United States, 143 U.S. 457, 461 (1892).

> [I]n construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

American Tobacco Company v. Werckmeister, 207 U.S. 284, 293 (1907).

> The strict letter of an act must . . . yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. . . . And unjust or absurd consequences are, if possible, to be avoided.

Fleischmann Company v. United States, 270 U.S. 349, 360 (1926).

> However well these rules [of statutory construction] may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

SEC v. C. M. Joiner Leasing Corporation, 320 U.S. 344, 350–51 (1943).

> Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970).

Another long-familiar doctrine of our judicial system is that:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932).[13] Following plaintiffs' construction of Section 15 would lead to injustice, oppression, absurd consequences and possible unconstitutionality, and I find nothing in the legislative history of the provision to suggest that such results were intended by the Congress. Moreover, plaintiffs fail to recognize that, notwithstanding the reference to the pre-1940 determinations, the provisions of the Hatch Act themselves, to the extent that they differ from the law and rules under which those determinations were made, indicate that Congress did not intend to incorporate many of those decisions.

Consider initially the inherent absurdity of plaintiffs' position with regard to the incorporation of those pre-1940 decisions interpreting the earlier Civil Service Rule prohibiting both partisan and nonpartisan political activity and all but *private* expression of personal political views. The Hatch Act, as amended in 1940, explicitly provided for federal employee par-

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[13] *See, e.g.,* United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971); Schneider v. Smith, 390 U.S. 17, 27 (1968); United States v. Rumely, 345 U.S. 41, 45 (1953); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

ticipation in nonpartisan political campaigns and dropped the provision of the former Rule prohibiting all but private expression of political opinion.[14] Plaintiffs' argument that all of the pre-1940 decisions were fixed in the definition of prohibited activity would create the absurdity that activities specifically exempted from the Hatch Act in Sections 9(a) and 18 were, at the same time, prohibited by Section 15. Such a construction is not tenable.

Similarly, in compiling the index to the pre-1940 decisions that is contained in the Commission's Political Activity Reporter,[15] the Commission noted:

> In many cases decided in the 1886–1940 period, and particularly in cases found in the Annual Reports, the decision did not specify the type of political activity involved. Because the precedent value of such cases is negligible, they have been omitted from the listing set out below.[16]

These are largely cases in which the entire recorded decision contains nothing more than a recitation that some named individual was disciplined for, *e.g.*, "undue political activity," or "corrupt practices." It should hardly be necessary to state that such incomplete decisions are of absolutely no value in elucidating the statute's definition of prohibited political management or campaigning. It would again create an absurd consequence to hold, as the plaintiffs contend, that all these decisions with no precedential value are incorporated in Section 15's definition. Obviously Congress did not so intend.

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[14] Sections 9(a) and 18 of the Act, 5 U.S.C. §§ 7324(b), 7326 (1970).

[15] I UNITED STATES CIVIL SERVICE COMMISSION, POLITICAL ACTIVITY REPORTER, *i-xxvi* (1971).

[16] *Id.* at *i.*

Plaintiffs seek to demonstrate that Section 15 was expressly intended to fix the definition in terms of the pre-1940 decisions through quotations from the Senate debates accompanying Section 15's inclusion in the 1940 amendments to the Act.[17] Yet the quotations they use are almost exclusively the biased, self-serving declarations of the bill's bitterest critics. Viewed in the context of the entire history of Section 15, and the traditional doctrines of statutory incorporation by reference, I find no such intent to create a definition wholly inflexible and immune from the normal processes of administrative and judicial interpretation which would ensure conformance with subsequent court decisions, particularly those interpreting the Constitution.

As the bill was reported to the Senate from its Committee on Privileges and Elections, the 1940 Amendments to the Act contained a Section 15 which would have authorized the Civil Service Commission to define the term "active part in political management or in political campaigns" through issuance of rules and regulations that could also subsequently be modified by the Commission. During the ensuing two weeks of debate on the Senate floor, Section 15 was bitterly assailed on two grounds, that it was an unconstitutional delegation of the congressional power to define the activities prohibited by the Act,[18] and the fear that the Commission's over-zealous efforts to obtain political neutrality in the Civil Service might result in rules and regulations that would infringe on funda-

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[17] This argument ignores somewhat the fact that the House of Representatives plays an equal part in the enactment of legislation.

[18] *See, e.g.*, 86 Cong. Rec. 2024–27 (remarks of Senator Thomas).

mental personal liberties.[19] The opposition thus sought a congressional statement of the prohibited activities rather than delegation of the defining power, and a limitation on the Commission's power to curtail individual freedoms through its interpretations of the Act.

See also remarks of Senator McKellar, *id.* at 2352.

Senator Hatch offered as a substitute to the Committee's Section 15 the section in substantially the same form as it was enacted.[20] Having been offered, and subsequently adopted, in response to the strong opposition to the Committee's Section 15, we can assume that it was intended to meet the two-pronged objections to the former version. Thus Section 15 as enacted does not delegate to the Commission the congressional power to define prohibited activities; but it does expand Congress' definition—through the common legislative technique of incorporation by reference[21]—to encompass both the statute and the refinements thereof that may be evidenced by any pre-1940 determinations interpreting post-1940 relevant statutory language. By that technique, the Commission's powers of interpretation were fixed within more precise limits. However, I do not conceive that the result was an immutable fixing of the definition but rather

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[19] *See, e.g., id.* at 2922 (remarks of Senator Brown):

"I am unwilling to authorize the Civil Service Commission to make rules of any character which would contravene the right of free speech and which would prevent the making of voluntary contributions. I am not sure that they would make any change, but I think we ought to state what we want done in that respect."

[20] *Id.* at 2928.

[21] *See generally* 82 C.J.S. *Statutes* §§ 371–73 (1953); 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5207–09 (3d ed. Horack, 1943).

it amounted to the imposition of a ceiling on the Commission's power to restrict individual political activity. The amended section met the fears of the opposition that the Commission might curtail personal liberties through progressively more restrictive regulations by imposing the existing interpretations as a limit beyond which the Commission could not go. I find no reason to construe this concern with the protection of individual freedom as an intent to prevent the Commission from acknowledging current Supreme Court decisions on First Amendment rights by receding from the outer limits of the restrictions set in the Act. The determinations which were incorporated by reference are subject to administrative and judicial interpretation the same as though they were statutes.

This view of Section 15 is fully consistent with traditional doctrines of statutory incorporation by reference.[22] Where a statute of one jurisdiction has been adopted by reference by the legislature of another jurisdiction, the general rule of construction within the adopting jurisdiction, *even in the absence of a statutory declaration,* is that the statute is presumed to have been adopted with the construction placed on it by the courts of the originating jurisdiction. Two exceptions to this general rule are useful for understanding and interpreting Section 15. First, though they are generally accorded great weight in construing incorporated statutes, rulings of administrative bodies in the originating jurisdiction are not considered binding in the adopting jurisdiction. Second, where by its terms the adopting statute is inconsistent with the incorporated statute or judicial constructions thereof, or where constitutional or other major public policies of the incorporating jurisdiction

[22] *Id.*

so conflict, the prior constructions give way to the conflicting expressions of the statute or the adopting jurisdiction's policies.

Section 9 of the Hatch Act is in major respects an adoption of former Civil Service Commission Rule One and an incorporation by reference of the applicable decisions interpreting its provisions. The Act came into being in response to various election abuses in the 1938 campaign involving federal employees that were not within the jurisdiction of the Commission. Section 9 incorporated Rule One, with some modifications,[23] as a general statute governing virtually all

[23] The principal modifications in Section 9, as enacted, included the extension of coverage to virtually all federal employees, permission to *publicly* express political opinions, and creation of an express penalty for violation thereof. At the time the Act was enacted, Civil Service Rule One, § 7, read as follows:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express *privately* their opinions on all political subjects, shall take no active part in political management or in political campaigns. [Emphasis added.]

Section 9, as enacted, provided:

(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their [the word "privately" was not included here] opinions on all political subjects. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice

federal employees. As Senator Hatch noted during the debate on Section 15 the following year:

> We have adopted the civil-service rules, and, under a well-known rule of law, when we adopt, for instance, the statute of a sister State, we adopt the construction the courts have placed on that statute.

86 CONG. REC. 2949. Thus the incorporation of the pre-1940 Commission determinations in Section 15 was, in practical effect, little more than a statutory recognition of this traditional canon of statutory interpretation. It did, however, conclusively avoid the problem that might have been posed by the exception limiting the precedential effect of administrative decisions.

More significantly, the statute which was enacted—the Hatch Act—was inconsistent with Rule One in the respects noted above. Thus the second exception to the

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President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

The 1940 amendments to the Act added three additional modifications of Rule One: further extension of the Act's coverage to state employees whose positions are principally funded by federal payments (Section 12); an express exemption from both Sections 9 & 12 for participation in nonpartisan political campaigns (Section 18); and an express grant of permission to participate in political management or campaigning in local elections in areas where the majority of the voters are federal employees (Section 16).

general rule would clearly call for ignoring all those pre-1940 interpretive decisions which interpreted those provisions of Rule One which were inconsistent with the terms of the Hatch Act. Similarly, the First Amendment is obviously both a constitutional provision and a vitally important public policy of our government and the teaching of the doctrine of incorporation by reference is that where such concepts conflict with the prior constructions those prior constructions must give way. Finally, the doctrine also acknowledges that subsequent growth and modification of such important policies should result in overruling inconsistent prior constructions from the originating jurisdiction. I consider that Senator Hatch's explicit reference to these "well-known rule[s] of law" reflects a recognition by Congress that the pre-1940 decisions which were incorporated in Section 15 should be treated no differently than any other decisions which have been incorporated in a statute by reference. The interpretation of Section 15 for which plaintiffs contend is wholly inconsistent with this established doctrine and in my opinion is an improper view of the statute.

Without plaintiffs' assumption regarding the immutability of Section 15's definition by incorporation, their overbreadth argument must fall. As I read Section 15, it incorporates as the Act's definition of prohibited political activity only those pre-1940 decisions which: (1) are sufficiently descriptive to serve as meaningful precedents, (2) are not inconsistent with the express provisions of other portions of the Hatch Act, and (3) which remain consistent with evolving concepts of individual freedom of political expression protected by the First Amendment, as announced by the courts.

This is not to say that the full scope of the First Amendment's protections are guaranteed to federal employees—for as *Mitchell* recognized substantial restrictions are concededly necessary to effectuate the Act's valid objectives of maintaining the integrity and impartiality of the Federal Civil Service. I would hold that in applying the pre-1940 precedents (and the post-1940 successor decisions that have built up from these earlier interpretations) the Commission cannot blindly rely on their continuing vitality. Instead, these decisions are the same as any statutes, subject to continuing administrative and judicial scrutiny to determine whether they are being applied in individual cases in conformance with the terms of the Act itself, the First Amendment, and other applicable constitutional principles. In my view this construction of Section 15 is consistent both with the legislative history and intent behind its passage, and with the traditional doctrine of incorporation by reference. Furthermore, I find that Section 15, as so construed, is not subject to constitutional criticism for overbreadth.

B. Vagueness

Thus I find that Section 15 and the decisions it incorporates by reference may be administered and interpreted the same as any statute. I believe that Congress intended so and that the Commission erroneously reached a contrary conclusion. This brings me to the problem of vagueness. If the definition of prohibited political activity is not absolutely fixed in terms of the pre-1940 Commission decisions, does the statute provide an ascertainable standard of conduct clear enough to inform a reasonable federal employee desiring to participate in the political process of what conduct is forbidden to him?

Both the proponents and opponents of Section 15 in the Senate were painfully aware of the difficulty of finding an adequate definition of the behavior they sought to proscribe.[24] Amendments seeking to enumerate specified categories of political activity were resisted largely on the basis that:

> Congress has never attemped in any of its civil-service laws to define what is pernicious political activity, for the situations are so variable, the facts are so different. Rarely, if ever, are the facts in two cases precisely alike. So I do not know how far Congress could go, or how wise it would be for Congress to define what is pernicious political activity. . . . This is such a flexible term, depending on the facts of each case, that I believe Congress by undertaking to include certain things, might not include many other things which ought to be included, simply because of inability to think of all of them at once.[25]

Rather than try "to think of all of them at once" Congress turned to the body of decisional law developed by the Civil Service Commission in over 50 years of practice with rules essentially identical to those adopted by the Act. Having incorporated in the Act

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[24] Indeed the Committee version of Section 15 had abandoned the attempt and would have delegated to the Commission the sole power to define the phrase "an active part in political management or in political campaigns." Senator Brown, the most vocal of Section 15's opponents, upon offering an amendment in substitute of Section 15, remarked:

> The amendment arises out of my desire to attempt to define, if I possibly can, what is political activity. I drew a long amendment on that subject, and I became dissatisfied with it. Like [Senator Hatch], I find it most difficult to define "political activity" . . . .

86 Cong. Rec. 2922.

[25] *Id.* at 2952 (remarks of Senator Barkley).

the Civil Service Rule One prohibition against taking "an active part in political management or in political campaigns," Congress then explicitly adopted—by incorporation—the Commission's decisional construction of that phrase instead of coining an independent definition. As I have indicated above, there is nothing inherently improper about this legislative technique of incorporation by reference.

The statutory standard here is in many respects analogous to a legislature's adoption of a criminal statute against such a common law crime as fraud—no attempt is made to define "fraud"; rather the long-existent body of judicial interpretations of the concept of fraud are impliedly incorporated.[26] The question is whether the resulting statute avoids the vice of vagueness. In a case such as this, the vagueness issue turns on whether the federal employee subject to the Act has been given adequate notice of what activities he must abjure in order to avoid violating the Act.[27]

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[26] The fraud analogy was suggested during the debate on Section 15 in this colloquy between Senators Brown and George:

Mr. BROWN. Now, let me read to the Senator what the Civil Service Commission said:

Definition of political activity: It is impossible to give a complete list of the particular activities in which an employee may not engage.

Mr. GEORGE. Why, certainly it is, just as the courts throughout the ages have refused to define fraud, because they could not imagine every conceivable circumstance under which a practice would be fraudulent or in good faith. They knew very well that when they did define it, those who wanted to defraud would take advantage of the definition and get around it; so the courts have always said that no absolute, rigid, exhaustive, and exclusive definition of fraud could be made. . . .

86 CONG. REC. 2954.

[27] *See* Cramp v. Board of Public Instruction, 368 U.S. 278, 287–88 (1961); Lanzetta v. New Jersey, 306 U.S. 451, 453

Such clear warning is necessary, particularly when legislating in the area of First Amendment protections, so that the employee is not prevented from participating in protected activities for fear of violating a prohibition whose boundary is not readily discernible.[28]

Since notice is the key to vagueness here, I consider highly relevant the availability of extrinsic aids to the interpretation of the statute.[29] Foremost among such extrinsic aids is the Commission's own digest and summary of the activities they have found to violate the political activity prohibitions. It is clear beyond question that Congress relied heavily on such summaries of the Commission's pre-1940 practice under

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(1939); Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

Professor Amsterdam's now-classic commentary on the vagueness doctrine finds the notice element only one of a broad complex of issues involved in the doctrine. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). However, having dealt with the closely related overbreadth concerns separately, and absent problems of federal-state relations in the judicial review of this federal statute, the problem here is much narrower in scope than is called for in a general analysis of vagueness.

[28] *See* Keyishian v. Board of Regents, *supra* note 10, 385 U.S. at 597–604; Baggett v. Bullitt, 377 U.S. 360, 366–73 (1964); NAACP v. Button, 371 U.S. 415, 432–33 (1963); Cramp v. Board of Public Instruction, *supra* note 23.

[29] In looking to such extrinsic aids one is, of course, aware of the potential for aggravation of the vagueness problem by a "prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules." Keyishian, *supra note* 10, 385 U.S. at 604. As indicated in the accompanying text, I find the Civil Service Commission's administration of the Hatch Act exceptionally helpful in clarfying the definition of prohibited activity rather than aggravating the problem of its potential for vagueness.

Rule One when enacting Section 15. Senator Hatch had prepared a post-card size listing of the eighteen principal activities prohibited under Rule One that was widely distributed prior to consideration of the Hatch Act itself in 1939. This card was read into the *Congressional Record* during the Senate's floor debate on Section 15 the following year.[30] In addition, the substantive portions of the Commission's Form 1236, *Political Activities and Political Assessments of Federal Officeholders and Employees,* were discussed and later inserted into the *Record.*[31] It is, of course, true that Section 15 incorporated the decisions themselves and not Form 1236's summary of their holdings, but the legislative history makes it apparent that we can look to Form 1236 for evidence of the congressional understanding of the content of those decisions and in construing their intent in enacting Section 15. Indeed, the Supreme Court in *Mitchell* looked to Form 1236 in precisely this manner without expressing any hesitation or doubts about the permissibility of doing so.[32] The Commission similarly used Form 1236 as a guide to the pre-1940 decisions in their early determinations under the Hatch Act.[33]

Today, to further aid government employees in understanding the Act, Form 1236 has been replaced by formal regulations promulgated by the Commission which represent their present interpretation of the

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[30] 86 CONG. REC. 2943.

[31] *Id.* at 2938–40. Senator Minton introduced this as pp. 13–80 of a larger document entitled CIVIL SERVICE ACT; RULES, STATUTES, EXECUTIVE ORDERS AND REGULATIONS, AMENDED TO JUNE 30, 1939. Senator Schwellenbach subsequently indicated that he had Form 1236 in his possession as a separate publication, and he referred to portions of the Form in his comments in opposition to Section 15. 86 CONG. REC. 2949.

[32] 330 U.S. at 103 & n. 38.

[33] Mondello affidavit, *supra* note 12, at 2–3.

meaning and extent of the pre-1940 decisions. 5 C.F.R. Part 733, §§ 733.101–.402 (1972).[34] Thus, the requisite notice to federal employees concerning what they must do to avoid taking "an active part in political management or in political campaigns" can be derived both from the rather straightforward statutory language itself, and from the more explicitly descriptive categories of behavior listed in these regulations.[35] To

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[34] Part 733 applies only to federal employees. Analogous regulations applicable to covered state and local government employees are contained in Part 151 of Title 5, C.F.R. (1972).

[35] The two principal regulations are as follows:

[5 C.F.R.] § 733.111 Permissible activities.

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge, or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fund-raising function, or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

be sure, these do not include every conceivable form of political action, with an express finding of "prohibited" or "permissible" applied to each. But such precision is not required; "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v.

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(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

§ 733.12 Political management and political campaigning: prohibitions.

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions,

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively par-

National Dairy Products Corporation, 372 U.S. 29, 32 (1963). Furthermore, the Commission provides a mechanism for obtaining advisory opinions from the Office of the General Counsel as to the applicability of the Hatch Act to specific situations and circumstances which is widely used by interested employees.[36]

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ticipating in a fund-raising activity of a partisan candidate, political party or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office.

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

Exceptions from the general prohibitions for nonpartisan elections, local elections in areas in which a majority of voters are federal employees, and for certain employees, are spelled out in §§ 733.123–24.

[36] Mondello affidavit, *supra* note 12, at 1–2, and attachments. Plaintiffs complain that these advisory opinions are not necessarily binding, if affirmative, nor appealable without risking an enforcement action for having ignored a negative opinion. Another three-judge panel of this court has held, however, that even in the area of alleged First Amendment infringement by the Hatch Act, judicial relief in advance of the full panoply of Civil Service enforcement procedures is not called for. Dingess v. Hampton, 305 F. Supp. 169 (D.D.C. 1969) (opinion of

In this context I conclude that the reasonable federal employee is provided an ascertainable standard of conduct that does not impermissibly infringe on his First Amendment freedoms. By the face of the statute he is informed that he may not actively participate in managing, or campaigning for, a partisan political candidate or issue. By the published provisions of the Commission's regulations he is informed of the most commonly recurring factual situations in which the Commission has found the prohibitions of the Act to apply or not to apply. Certainly the standards here are *more precise* than the standards which exist without challenge in other major federal statutes,[37] violations of which generally subject the offending party to more severe, criminal, sanctions. In the event that he remains uncertain of the applicability of the Act to the specific course of action he seeks to pursue, he may obtain an advisory opinion from the Office of the General Counsel of the Commission.[38] I believe that no greater certainty than this

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McGowan, Circuit Judge). These procedures were intended to provide an expert forum for resolving the frequent doubts involving the "applicability of the variously phrased prohibitions of the Hatch Act to particular conduct," and they provide an opportunity for subsequent judicial review of the constitutional issues presented "on a fully developed record." *Id.* at 174.

[37] *Compare, e.g.*, standards for determining liability for various forms of securities fraud, 15 U.S.C. §§ 77q, 77www, 78i, and 78r; anti-trust violations, 15 U.S.C. §§ 1 *et seq.;* and violations of the Internal Revenue Code, 26 U.S.C. §§ 7201–15. These statutes are not directed specifically at activities protected by the First Amendment, but they can strike more severely in the areas of other constitutional rights.

[38] If, after all of this, he considers that the interpretations provided him violate his First Amendment right to pursue that course of conduct, he is of course free to act. Then, *if* the Commission seeks to enforce the Act against him he will have the full opportunity of administrative and judicial review

is required in order to find that 5 U.S.C. § 7324(a)(2) is not impermissibly vague in the constitutional sense—fair notice as to the statute's limitations on employee conduct is amply provided.

IV

Having found that the definition of prohibited political activity contained in 5 U.S.C. § 7324(a)(2) is not, as construed, overbroad or unconstitutionally vague, I would deny plaintiffs' request for declaratory and injunctive relief against its operation. While I believe that the Commission's interpretation of Section 15 over the years since its enactment has been largely consistent with the construction I have found appropriate here, it is not entirely clear that this has been accomplished explicitly or through the exercise of prosecutorial discretion in the enforcement of the Act.[39] This doubt must be erased, for constitutional protections cannot properly rely on prosecutorial discretion.[40] I would therefore merely order the Commission to review the pre-1940 decisions in which Congress defined "tak[ing] an active part in political management or in political campaigns," and to change any of its published interpretations and codification material to conform to this opinion and any applicable decisions of the Supreme Court. The Commission's Office of the General Counsel has already endeavored

---

in which to litigate his First Amendment claims. This opportunity is not dispositive of the issue of the statute's vagueness *vel non*, but it is relevant to the extent that plaintiff's vagueness claim represents an asserted deprivation of due process. The procedure does provide a forum for resolution of specific, concrete allegations of deprivation of First Amendment rights.

[39] *See* Mondello affidavit, *supra* note 12, at 3–4.

[40] Baggett, *supra* note 24, 377 U.S. at 373; Cramp, *supra* note 23, 268 U.S. at 286–87.

to do this on a continuing basis,[41] and it may well be that their publications and decisions have been kept in line with the Supreme Court's decisions on the First Amendment and other applicable laws. So, in the absence of any specific showing of illegality and in the strong likelihood that no substantial changes will be necessary, I would not retain jurisdiction but would rather merely direct the Commission to review its procedures and published regulations to ensure conformance with this opinion. This would leave any specific regulation subject to individual challenge in the future by individual cases or controversies. I would direct the issuance of an appropriate order to that effect.

To the extent that the majority opinion differs from the foregoing I respectfully dissent. I see no necessity in this stage of our national existence to set aside a statute that is as soundly based in our governmental framework as is the Hatch Act. And I am unable to find any authority for this court to overrule, in effect, a decision of the Supreme Court to accomplish that result.

GEORGE E. MACKINNON
United States Circuit Judge.

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[41] *See* Mondello affidavit, *supra* note 12, at 3–4:

The Office of the General Counsel has consistently endeavored to place its operations within the scope of both specific court decisions (*e.g.*, Wilson v. United States Civil Service Commission, 136 F. Supp. 104, D.D.C. 1955), and discernible trends in judicial decisions generally. We certainly are aware of the great advances in the areas of individual liberties and due process that have taken place since 1940, and we attempt to administer the Hatch Act in the context of currently accepted constitutional doctrine and other legal doctrines. Should such doctrine collide with a strict interpretation of the Act, the Rule, or past administrative decisions, it is our policy that the current doctrines by which we are bound will prevail.

APPENDIX B

Regulations Involved

5 C.F.R. Part 733 provides in relevant part:

733.101 *Definitions.*

In this subpart:

(a) "Employee" means an individual who occupies a position in the competitive service;

(b) "Agency" means an executive agency and the government of the District of Columbia;

(c) "Political party" means a National political party, a State political party, and an affiliated organization;

(d) "Election" includes a primary, special and general election;

(e) "Nonpartisan election" means—

(1) An election at which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; and

(2) An election involving a question or issue which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance, or any question or issue of a similar character; and

(f) "Partisan" when used as an adjective refers to a political party.

* * * * *

733.111 *Permissible activities.*

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge, or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fundraising function; or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interest.

* * * * *

§ 733.122 *Political management and political campaigning; prohibitions.*

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club.

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or account-

ing for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate political party, or political club;

(5) Take an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

* * * * *

§ 733.124 *Political management and political campaigning; exception of certain elections.*

(a) Section 733.122 does not prohibit activity in political management or in a political campaign by an employee in connection with—

(1) A nonpartisan election, or

(2) Subject to the conditions and limitations established by the Commission, an election held in a municipality or political subdivision designated by the Commission under paragraph (b) of this section.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1972

Civil Action No. 577-71

In the United States District Court for the District of Columbia

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET. AL., PLAINTIFFS

v.

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that the defendants hereby appeal to the Supreme Court of the United States from the Opinion and Order entered in this action on July 31, 1972.

HARLAND F. LEATHERS,
Department of Justice,
Attorney for Defendants.

FILED: AUGUST 25, 1972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., Appellants

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

On Appeal From the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

1. We agree with the Government that the issue presented is manifestly important (J.S. 9). It does not follow that it is, therefore, substantial.

In this case, as in other appeals from federal courts, Rules 15(1)(f) and 16(1)(c) apply. Under these provisions, the burden is on appellants to show that "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and

oral argument, for their resolution" (Rule 15(1)(f)). That burden manifestly has not been met by the Government's one-paragraph discussion of the merits in the Jurisdictional Statement (J.S. 9-10).

We readily concede that it is a rare case where a three-judge district court's invalidation of an Act of Congress is so clearly correct as not to present a substantial question. This, we submit, is such a case. Whatever the state of constitutional law three decades ago when the Hatch Act[1] was enacted, or a quarter of a century ago when its constitutionality was last before this Court on the merits,[2] the First Amendment principles followed by the district court here are now so well established,[3] and their applicability to the Hatch Act so patent, as to require no elaboration.

2. The Government indulges in hyperbole in characterizing the decision below as "removing all restraints on partisan political activity by federal employees" (J.S. 7). If that were the holding of the district court, plenary consideration here would surely be merited. But the district court held no more than that, when the Congress directly restricts free political speech and association, (a) it must do so in comprehensible language with reasonably ascertainable standards, and (b) it may impose only such restrictions as are necessary to protect identifiable and overriding

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[1] 5 U.S.C. § 7324 (a) (2).

[2] United Public Workers v. Mitchell, 330 U.S. 75; Oklahoma v. Civil Service Commission, 330 U.S. 127.

[3] See, *e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108, 114-15; Police Department of Chicago v. Mosley, 408 U.S. 92, 101; Gooding v. Wilson, 405 U.S. 518, 521; Dunn v. Blumstein, 405 U.S. 330, 342-43; Papachristou v. City of Jacksonville, 405 U.S. 156, 162.

governmental interests. Carefully left intact were numerous statutory protections against pernicious political activity by governmental employees, such as coercion of subordinates, and the like.[4] The only restraints struck down were those which broadly prohibit voluntary partisan activity, and which the district court found to be so obscurely defined that "no one can read the Act and ascertain what it prohibits" (J.S. 7a).

The district court expressly recognized, moreover, that "there is an obvious, well-established governmental interest in restricting political activities by federal employees" (J.S. 2a). It explicitly left wide latitude for the Congress to protect that interest by "carefully and narrowly drawn" legislation consistent with the First Amendment (J.S. 11a).

The constitutional standard applied to the Hatch Act by the district court was meticulously expressed, and conforms precisely to this Court's decisions on vagueness and overbreadth under the First Amendment (J.S. 11a-12a):[5]

> "Some activities involving speech and association may be regulated where a proper governmental purpose and definite need is demonstrated. The interference with privileged conduct must be care-

[4] *E.g.*, 5 U.S.C. § 7321 (authorizing rules to protect government employees from coerced political contributions or service); 5 U.S.C. § 7324(a)(1) (prohibiting federal employees from using official authority or influence to interfere with or affect an election); 18 U.S.C. ch. 29 (providing criminal penalties for various forms of political coercion or intimidation of or by government employees).

[5] *E.g.*, Grayned v. City of Rockford, note 3, *supra;* United States v. Robel, 389 U.S. 258; Keyishian v. Board of Regents, 385 U.S. 589.

> fully and narrowly drawn. Executive agency employees as citizens are entitled to be specifically informed as to what the Congress intends to forbid. [Footnote omitted.] Restrictions may not be achieved by means which sweep unnecessarily broadly into the First Amendment areas. [Footnote omitted.] This right and privilege of expression and association cannot be so unnecessarily invaded that the use is dampened and discouraged. To chill is to despirit, and the First Amendment will not flourish but can be gradually suffocated in such an atmosphere."

Applying this standard, the court below fully canvassed the structure and operation of the Hatch Act, with its blanket incorporation by reference of several thousand obscure, confusing, and excessive pre-1940 administrative rulings, as well as the Government's attempted justification of the Act.[6] Further deliberation should be unnecessary to affirm the clearly compelled and long overdue invalidation of the Hatch Act on the grounds stated by the district court.

3. Nor is plenary review warranted by *United Public Workers* v. *Mitchell*, 330 U.S. 75, or *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127. Even prior

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[6] The district court expressly considered and properly rejected the Government's argument that clarifying and narrowing administrative regulations and advisory rulings could save the statute (J.S. 9a-10a). Quite apart from the fact (see J.S. 6a) that Congress expressly refrained from giving the Civil Service Commission "any more power to interpret further in the future" (86 CONG. REC. 2949 (1940) (Remarks of Senator Hatch)), it is settled that "well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague [and overbroad] law" (Baggett v. Bullitt, 377 U.S. 360, 373).

to the decision below, courts[7] and commentators[8] alike had recognized that this Court, in its development of First Amendment jurisprudence, long ago repudiated each of the two premises on which those cases rest. The 4-3 *Mitchell* decision, which (as appellants concede, J.S. 9) failed even to discuss the vagueness and overbreadth arguments relied upon here, was bottomed on the two propositions: (a) that public employment is a privilege to which no constitutional rights attach, and (b) that First Amendment impairments may be judged by the "rational nexus" test applicable to economic regulation—"it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service" (330 U.S. at 101). The decision below properly left these misconceptions in the desuetude to which this Court has consigned them. *Cf. Angel* v. *Bullington,* 330 U.S. 183, 192.

4. Granting this motion for summary affirmance will assure that the Congress will proceed immediately to consider whether and how the public interest requires properly circumscribed restrictions on voluntary partisan political activity by government employees. The plenary review sought by the Government, in contrast,

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[7] *E.g.,* Hobbs v. Thompson, 448 F.2d 456 (5th Cir.); Mancuso v. Taft, 341 F.Supp. 574 (D.R.I.), *appeal docketed,* No. 72-1180, 1st Cir., May 23, 1972; Fort v. Civil Service Commission, 61 Cal.2d 331, 392 P.2d 385, 38 Cal.Reptr. 625 (1964); Minielly v. State, 242 Ore. 490, 441 P.2d 69 (1966); Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); DeStefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (Super.Ct. 1967).

[8] *E.g.,* EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 582-92 (1971 ed.) ("Plainly the approach of the Court in the *United Public Workers* case is outdated and must be abandoned." *Id.,* at 590); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV.L.REV. 1439 (1968).

would involve the Court in the dubious enterprise of straining to rewrite a complex and confusing statutory scheme that in no event could pass constitutional muster in its present form.[9] Any such judicial process of patchwork reconstruction could result only in a statute never contemplated, considered or enacted by the legislative branch. But, "the task of writing legislation which will stay within [constitutional] bounds has been committed to Congress." *United States* v. *Robel,* 389 U.S. 258, 267.

CONCLUSION

No substantial constitutional question is presented. The motion to affirm should be granted.

Respectfully submitted,

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November 7, 1972

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[9] Even the dissent below found it necessary to disregard the plain terms of Section 15 in order to rescue it from First Amendment condemnation (J.S. 30a-33a). As the majority observed, however, "In the delicate, precious area of free speech, the obligation of the courts to seek all possible, even if somewhat tortured, means to uphold admittedly fuzzy congressional action must give way to other considerations" (J.S. 13a).

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion and order of the three-judge district court (J.S. App. A, pp. 1a–44a) is reported at 346 F. Supp. 578.

JURISDICTION

The order of the three-judge district court declaring the statute unconstitutional and enjoining its enforcement was entered on July 31, 1972. A notice of appeal to this Court was filed on August 25, 1972, and the Court noted probable jurisdiction on December 12,

1972. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether the prohibition of the Hatch Act against federal employees taking "an active part in political management or in political campaigns" is unconstitutional on its face.

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 7324 provides:

> (a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—
>
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> (2) take an active part in political management or in political campaigns.
>
> For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.
>
> (b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.
>
> (c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole

or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

(d) Subsection (a)(2) of this section does not apply to—

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

(4) the Commissioners of the District of Columbia; or

(5) the Recorder of Deeds of the District of Columbia.

5 U.S.C. 7326 provides:

Section 7324(a)(2) of this title does not prohibit political activity in connection with—

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others

of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

The pertinent regulations of the Civil Service Commission, 5 C.F.R. 733.101, 733.111, 733.122, and 733.124, are set forth in Appendix B to the Jurisdictional Statement, pp. 45a–49a.

STATEMENT

Appellees are a federal employees' postal union, certain individual federal employees, and local Democratic and Republican political committees. They brought this class action in the district court challenging the constitutionality of the provision of the Hatch Act (5 U.S.C. 7324(a)(2)) that bars federal employees from taking an "active part in political management or in political campaigns." Alleging, *inter alia,* that the individual employees either had violated the Act and were threatened with its enforcement or desired to engage in prohibited activities (App. 6–10), the appellees sought a declaration that the Act is unconstitutional and an injunction against its enforcement. A three-judge district court, in a divided decision, held Section 7324(a)(2) invalid and enjoined its enforcement. It stayed its order pending appeal to this Court.

The court recognized the "appropriateness of [the] governmental objective" of the Hatch Act (J.S. App. A, p. 3a). The defect in the statute, the court held, was the definition of the expression "an active part in political management or in political campaigns" as

meaning "those acts of political management or political campaigning which were prohibited [for federal employees] * * * before July 19, 1940, by determinations of the Civil Service Commission * * *." The court held that this definition required federal employees to consider, as a guide to their political conduct, the entire body of pre-1940 administrative rulings "rigidly incorporated" into the Act (*id.* at 9a). These rulings, according to the court, often proscribed constitutionally permissible conduct and were inconsistent with each other and with the language of the Hatch Act itself.

Although recognizing that "[t]he incorporated rulings were to serve generally as an upper limit on future interpretations or expansions of previously prohibited political activity * * *" (*id.* at 6a), the court held that "no constitutionally acceptable mechanism was provided for accomplishing this result" (*id.* at 6a–7a). It rejected the administrative gloss placed on the statute by the Commission's regulations and decisions, holding that Congress conferred no power on the Commission to clarify or define the statutory prohibition (*id.* at 7a, 9a). As a result, the court concluded that the statute was both overly broad and impermissibly vague, characterizing this as "a classic case of a statute which in its application has a 'chilling effect' unacceptable under the First Amendment" (*id.* at 11a).

The court recognized that this Court had upheld the constitutionality of the Hatch Act in *United Public Workers* v. *Mitchell*, 330 U.S. 75. It stated, however,

that "the *Mitchell* opinion explicitly left open the question of the constitutionality of the incorporation-by-reference section of the Act" (*id.* at 13a). Furthermore, even if *Mitchell's* holding were considered binding, the court characterized it as "inconsistent with subsequent decisions delineating First Amendment freedoms. These precedents, which developed the 'least restrictive alternative test' for governmental incursions into the area of free speech, undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based. The decisions, coupled with changes in the size and complexity of public service, place *Mitchell* among other decisions outmoded by passage of time" (*ibid.;* footnote omitted).

Judge MacKinnon dissented. He concluded that the claim of overbreadth lacked validity because Section 7324(a)(2) did not incorporate all pre-1940 administrative decisions, but only those consistent with other provisions of the Act and with evolving concepts of First Amendment rights (*id.* at 33a). Pointing to the regulations promulgated by the Civil Service Commission (J.S. App. B, pp. 45a–49a), which set forth in considerable detail the principle prohibited and permitted political activities, as well as to the Commission's practice of rendering advisory opinions on request, he concluded that the federal employee could ascertain with reasonable precision what constitutes prohibited political activity, and that the statute was thus "not impermissibly vague in the constitutional sense" (J.S. App. A, pp. 42a–43a).

ARGUMENT

INTRODUCTION AND SUMMARY

We do not understand this case to raise a question as to whether Congress may constitutionally prohibit active political management or political campaigning, properly defined, by federal civil servants. Rather, the question is whether Congress has in the Hatch Act defined the prohibition in a manner that is impermissibly vague or that overbroadly sweeps within its proscription activities that Congress may not properly restrict—*and*, if either of these vices is present, whether a clarifying or limiting construction of the statute, or excision of the unlawful prohibitions, is not feasible, so that the only recourse to assure adequate protection of constitutional rights of federal employees is an invalidation of the entire proscription on its face.

It is important, at the outset, to state clearly what the Hatch Act does not do:

(1) It is not a censorial law addressed to the suppression of unpopular views; it does not single out persons who advocate particular political viewpoints, or penalize any one for association with persons or organizations oriented to such advocacy. See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589. Rather, it applies in exactly the same way regardless of the viewpoint being advocated. Cf. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367.

(2) It is not a law that is being used to further an

impermissible practice of discrimination against or intimidation of racial or other minorities. See, *e.g.*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415.

(3) It is not a law that forces individuals to disclose their association with unpopular causes or organizations, thereby exposing them to public obloquy and inhibiting the organizations' membership and fund-raising prospects. See, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.

(4) It is not a sweeping prohibition of all political activities; most importantly, it does not prohibit or inhibit the adherence to or expression of any beliefs or opinions on political subjects or candidates. Not one federal employee's vote goes uncast because of the Hatch Act, nor one idea unexpressed; rather, the Act is tailored to protect these values, while circumscribing political activities, beyond speech and voting, that Congress has deemed inimical to the maintenance of an impartial and efficient civil service.

These considerations, which differentiate this case from many of the decisions from which current First Amendment doctrines have evolved, dictate the exercise of caution by the judiciary before applying the relatively drastic remedy of facial invalidation in the event the Hatch Act is found defective in any particulars. See Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 918–927 (1970).

The Hatch Act legislates in an area of paramount governmental concern, dealing with core problems of the operation of the government itself. This consideration, as the Court pointed out in *Pickering* v.

Board of Education, 391 U.S. 563, 568, is relevant to the First Amendment analysis:

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents, supra,* at 605–606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The objectives served by the Hatch Act's prohibitions on active political management and campaigning are readily apparent:

(1) By restricting the government employee's involvement in partisan politics, the prohibition diminishes the likelihood that the employee will allow partisan political predilections to interfere with the impartial execution of the government's business in accordance with the policies dictated by Congress—policies that he as a political candidate or adherent of a political candidate might reject or seek to change. Of course, it may sometimes happen that the employee, even if not actively involved in politics, will disapprove of policies and programs that he is charged

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with implementing; but it is reasonable to anticipate that active, partisan compaign involvement would materially increase that hazard.

(2) By precluding active, partisan campaigning, the Act makes it impossible for the party in power to turn the federal civil service into a useful instrument for affecting the outcome of elections. This concern figured importantly in the enactment of the Hatch Act, because such abuses had in fact been widespread in the 1936 and 1938 elections and were known to be a political fact of life in many States. See pp. 15–17, *infra.*

(3) Equally important with the concern that partisan political activity may detract from the impartiality of the performance of government employees is the concern that such activities, being observed by the public, will erode public confidence in the impartial administration of the federal government.

(4) The prophylactic approach of the Hatch Act also serves to assure that government employees will not be or feel themselves compelled to engage in unwanted partisan political activities in order to curry favor with their superiors and enhance their prospects for continued employment or for advancement. Such pressures can be brought to bear on employees in extremely subtle ways beyond the effective reach of any anti-coercion regulation, no matter how tightly drawn. Indeed, in many instances the employee might feel that his prospects for job advancement would be enhanced by political activity aligned with his superior's partisan predilections, even though his su-

perior may have done or said nothing providing objective grounds for such feelings. The restrictions adopted by Congress in the Hatch Act insure that the employee will not feel these pressures—real or imagined—by removing his capacity to respond to them by working for what he perceives to be his superior's partisan political interests. See Statement of Civil Service Commission Chairman Hampton, Hearings on S. 3374 and S. 3417 before the Senate Committee on Post Office and Civil Service, 92d Cong., 2d Sess., pp. 51–52, 56.

Thus, the Hatch Act's restrictions on partisan political activities serve not only objectives of efficiency in the government service, but also important First Amendment values. The restrictions protect the integrity of the nation's political processes from the danger of disruption by a partisan political machine manned by substantial numbers of government employees; at the same time, the employees themselves are protected from pressures that might otherwise cause them to engage in political activities not of their own choosing.

The district court misconstrued the statute by holding that all pre-1940 decisions of the Commission had been rigidly incorporated into the definition of prohibited political activities, including those inconsistent with the Hatch Act's own guarantee of the right of expression on political subjects and candidates and the right of full participation in non-partisan political matters. It further erred in refusing to consider the authoritative interpretation of the Hatch Act's re-

strictions embodied in regulations of the Civil Service Commission.

As authoritatively construed by the Commission, the Hatch Act's restrictions are neither impermissibly vague nor overbroad. Permitted and prohibited activities are defined in a clear and informative manner providing adequate guidance to affected employees as well as clear guidelines for fair and impartial administration of the prohibitions. While the regulations do not specifically cover every imaginable situation that might arise—an impossible goal, given the complexity of the subject matter—they do cover the bulk of political activities in which government employees are likely to consider engaging; and the Commission has an advisory opinion procedure to afford guidance to interested employees with respect to interstitial situations not specifically covered by the regulations.

Set against this backdrop, the district court erred in holding the Hatch Act vague and overbroad. Moreover, to the extent that there are elements of vagueness or overbreadth present in connection with particular facets of the political activity prohibition as construed and applied, the proper remedy for such deficiencies is not facial invalidation of the entire prohibition. There is ample room for an appropriate construction of the Act's prohibitions, and particular offensive application can readily be excised by review of the individual prohibitions set forth in the regulations.

The district court's invalidation of the statute was based on what might be termed "procedural" or draft-

ing defects. The court did *not* hold that any of the provisions of the restriction against partisan political activities currently being applied by the Commission under its regulations and decisions in political activity cases are invalid. Nor would any such holding be warranted. In view of the important objectives that Congress sought to attain by this legislation, it was, as this Court held in *United Public Workers* v. *Mitchell*, 330 U.S. 75, well within the range of reasonable and permissible choices open to Congress to select a prophylactic approach under which active campaigning of any sort was barred, although the right to express opinions was preserved. That holding retains its validity today, and it is such a policy that the Commission is enforcing. Whether a less restrictive approach should be adopted, involving a gamble that greater freedom to engage in partisan politics would not bring about the consequences feared by Congress in imposing restrictions on political activity, is a judgment properly left to Congress.

I. THE LEGISLATIVE HISTORY OF THE HATCH ACT AND THIS COURT'S DECISIONS UPHOLDING ITS CONSTITUTIONALITY

In order to place the statutory and constitutional issues in this case in proper perspective, we shall first set forth the legislative history of the Hatch Act and then discuss briefly this Court's decisions in *United Public Workers* v. *Mitchell*, 330 U.S. 75, and *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, which more than 25 years ago upheld the constitutionality of the Act.

The Hatch Act was the culmination of many years' experience in this country in attempting to provide a

merit system in federal employment that would be free from partisan politics. We describe that history in the Appendix, *infra,* pp. 63–70. It shows that the problems of political patronage in federal employment existed since the early days of the Republic, that various Presidents attempted to correct the situation by promulgating regulations prohibiting political activities by federal employees, and that Congress finally dealt with the problem in 1883 when it passed the Civil Service Act.

That Act created the Civil Service Commission as the agency to administer the civil service and declared that "no person in the public service is for that reason under any obligations * * * to render any political service" and does not have "any right to use his official authority to influence or coerce the political action of any person or body." 22 Stat. 403, 404. Pursuant to his rule-making authority under the Act, President Arthur, on May 7, 1883, promulgated the original Civil Service Rules. These rules contained no specific prohibition against participation by federal employees in political campaigns, but merely restated the language of the Act, providing in Rule I that "no person in [the executive civil] service shall use his official authority or influence either to coerce the political action of any person or body or to interfere with any election." 8 Richardson, *Messages and Papers of the Presidents* 161 (1898).

In 1907, President Theodore Roosevelt issued Executive Order No. 642, which provided in part as follows:

> No person in the Executive civil service shall use his official authority or influence for the

> purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns. [Twenty-fourth Annual Report of the Civil Service Commission, p. 104 (1908).]

Civil Service Rule I was promptly amended to contain this language, which continued in effect without change until the Hatch Act was passed in 1939.

From 1886 to the enactment of the Hatch Act, the Commission decided more than 2600 cases involving alleged political activity in violation of Civil Service Rule I. Although many of these decisions did not specify the particular political activity involved, a number did discuss and elucidate the prohibition against political activity in Civil Service Rule I. Thus, when the Hatch Act was enacted, Civil Service Rule I had a well-defined and generally understood meaning, although its application in some borderline situations may have been unclear.

A. THE ENACTMENT OF THE HATCH ACT

1. In 1939, Congress enacted the Hatch Act, which, among other things, imposed upon non-classified federal employees the same restrictions against political management and campaigning as had theretofore been applied to classified workers by Civil Service Rule I. Passage of the Act was a direct result of electoral

and related abuses that had occurred during the 1936 and 1938 national elections.

During the 75th Congress, charges were made that various of the emergency relief agencies which had been established during the 1930's to combat the problems of the depression were being utilized for political purposes. The Senate established a bipartisan committee to investigate the charges. The committee, which was chaired by Senator Sheppard, issued a report in 1938 finding that there had been widespread "manipulations of Federal relief appropriations, as well as intimidation of relief workers during the primary and general elections of 1936 and 1938 * * *" (84 Cong. Rec. 9598). With respect to the latter practice, it was revealed that there were numerous instances of relief project officials "levying political tribute" (*ibid.*) on relief workers. Not only were relief workers required to contribute funds to the campaigns of specific partisan candidates, but also, through importunings and intimidation, attempts were made to "capture" the vote of these workers (84 Cong. Rec. 9606):

> Many of those in charge of this relief [W.P.A.] boldly insisted that voters change their party registration and vote for candidates favored by those in charge of the W.P.A., and if they refused they were denied W.P.A. work or were discharged.

Many in Congress saw the federal work force, which had been suddenly expanded in response to the economic problems confronting the Nation, developing "into a powerful, corrupt, partisan, political machine"

(*ibid.*). For example, it was charged that "[t]ens of thousands of people receiving large salaries were rendering no service to the people [but, instead,] were devoting their time in pernicious political activities" (*ibid.*). See also 84 Cong. Rec. 9604. Section 9(a) of the Hatch Act of 1939 (53 Stat. 1148, et seq., as amended, 5 U.S.C. (1964 ed.) 118i(a)), *et seq.* was designed to combat the development of a "partisan, political machine" made up of federal employees by prohibiting such employees from actively engaging in partisan affairs. As one Congressman explained (84 Cong. Rec. 9603):

> If this Congress continues its present practice we are going to foster and approve the most gigantic political machine that is known in any nation anywhere. This bill [the Hatch Act] will prevent those who are appointed to positions under the Federal Government from taking an active part in the management of political campaigns or engaging in them actively. If they do take such part and active interest they will lose their jobs.

Section 9(a) provided, in pertinent part, that "[n]o officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." In discussing the bill on the Senate floor, Senator Hatch made it clear that Section 9(a) was intended as "a copy of the present civil service rules" (84 Cong. Rec. 4303). See also S. Rep. No. 221, 76th Cong., 1st Sess., p. 2.

As originally passed by the Senate, Section 9(a) was the same as Rule I in all significant respects, in-

cluding the allowance of only *private* expression of opinion on political subjects. See 84 Cong. Rec. 4192. In the House, however, the provision was amended to strike the word "privately," so that, as finally enacted, it provided: "All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects." See 84 Cong. Rec. 9622–9626. Senator Hatch subsequently explained the congressional purpose in making this change from the Civil Service rule (86 Cong. Rec. 2623):

> More than that, Mr. President, to make assurance double sure at the last session that no such right [of free speech] should be curtailed, in the bill we then passed we expressly provided that all persons should have the right to express their opinions on all political subjects, and the word "privately," which appears in the civil-service rule, was deliberately stricken out and the President of the United States, in commenting on that fact in his message, pointed out that there was involved in the legislation no curtailment or abridgement of the right of freedom of speech.

In summary, the 1939 legislation had the following consequences relevant to this case:

(1) It made statutory the pre-existing restrictions imposed by Executive Order and Civil Service Rule on political activities of employees in the executive civil service.

(2) It extended the restriction on political management and campaigning from employees in the classified civil service to "any person employed in the executive branch of the Federal Government, or any

agency or department thereof," with a few specified exceptions. Section 9(a), 53 Stat. 1148.

(3) While Rule I had restricted employees to "private" expression of opinion on political subjects, Section 9(a) of the Hatch Act was so worded as to insure that public as well as private expressions of opinion would be protected. See 40 Ops. A. G. 14, 20–27.[1]

(4) By Section 9(b), Congress required the removal from office of any federal employee found to have violated the political activity prohibition. Previously, the sanction for such a violation had been discretionary, and lesser penalties than removal from office were usually imposed.[2]

When President Roosevelt signed the Hatch Act of 1939, he called attention to the fact that its prohibition against political activity by government employees applied only to employees of the federal government. He suggested that Congress at its next session study the feasibility of extending the provisions of the law to cover certain state and local government employees. See, generally Howard, *Federal Restrictions on the Political Activity of Government Employees*, 35 Am. Pol. Sci. Rev. 470, 480 (1941). In less than one year, Congress responded with a bill, in the form of amend-

[1] In 1940, this portion of Section 9(a) was amended to extend the area of permitted expression of opinion from "political subjects" to "political subjects and candidates." See 86 Cong. Rec. 2985.

[2] In 1950, Congress amended this provision to confer limited discretion on the Commission to impose a suspension of no less than 90 days in lieu of removal. 64 Stat. 475. In 1962, the minimum penalty was reduced to a 30-day suspension. 76 Stat. 750.

ments to the Hatch Act, which made most of the provisions of the 1939 Act applicable "to employees in the States whose employment is made possible by the use of Federal funds or appropriations from the Federal Treasury."[8] 86 Cong. Rec. 2338. Senator Hatch explained (86 Cong. Rec. 2338–2339):

> In approaching that task we have tried to follow as nearly as possible the exact language of the act we passed last year, which, in turn, was the exact language of the rule of the Civil Service Commission which has been in effect more than 50 years; and that language was originally chosen because it had been in effect in this country so long and was so thoroughly understood.

As originally introduced in the Senate, the 1940 amendments to the Hatch Act included a provision, Section 15, which directed the Civil Service Commission to promulgate rules or regulations defining the term "active part in political management or in political campaigns." According to the accompanying committee report (S. Rep. No. 1236, 76th Cong., 3d Sess., p. 4):

> After the promulgation of such rules or regulations, they will be controlling as to the meaning of such term when it is used in this act with respect to Federal employees as well as when it is used with respect to State and local employees. The Commission is authorized

[8] Among other things, the 1940 amendments to the Hatch Act, 54 Stat. 767–772, also granted to those covered by the law the right actively to participate in non-partisan elections and campaigns. See generally 5 U.S.C. 7326.

to amend such rules or regulations from time to time as it deems necessary.

Resistance to Section 15 was immediate, based primarily on the fear that such a grant of rule-making authority to the Commission would amount to an unconstitutional delegation of congressional power. See, *e.g.*, 86 Cong. Rec. 2928. In response to this criticism, Senator Hatch submitted a substitute which provided that the political activity prohibited by Section 9(a) of the original Act included only such activity as the Civil Service Commission had theretofore determined to be prohibited on the part of employees in the classified civil service. *Ibid.* After some debate on the amendment, Senator Hatch, indicating that he had "made a slight modification in it" (86 Cong. Rec. 2937), had the substitute measure read again. In its modified version, the amendment (with the modification emphasized) provided (*ibid.*):

> The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined *are at the time* of the passage of this act prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

Some of those who objected to Section 15 in its original form also argued against the substitute. They maintained that the substitute version incorporated into the Act a body of substantive law which had never been reviewed by the Senate. See, *e.g.*, 86 Cong. Rec. 2940, 2947–2949. In order to apprise the Senate of precisely what the Civil Service Commission had previously "determined [to be] * * * prohibited on the part of employees in the classified civil service," Senator Hatch introduced into the Record a section of the Commission's then-current political activity pamphlet, entitled "Particular Types of Prohibited Activities." This material contained a detailed discussion of the Commission's policies with regard to enforcement of the ban against political campaigning and management as it was being administered at the time. See 86 Cong. Rec. 2938–2940.

In addition, Senator Hatch circulated and had printed in the Record a card which contained a more succinct summary of specific political activities which the Commission had previously found unlawful under Civil Service Rule I, and which were then considered by the Commission to violate Rule I. 86 Cong. Rec. 2943.[4] Senator Hatch stated that "there is no question that they [the prohibitions listed on the summary card] cover the entire substance of the [Civil Service

[4] The summary listing of 18 principles which appeared on the card was not a regular publication of the Civil Service Commission; rather, it had been put together by Senator Hatch, with the Commission's assistance, for use in explaining the meaning of the prohibition adopted in Section 9(a) of the Hatch Act in 1939. 86 Cong. Rec. 2948.

Commission's] rules [against political activity]." 86 Cong. Rec. 2937. He further stated that "[u]nder that rule [Civil Service Rule I], which has been in existence for more than 50 years, the Civil Service Commission has made certain definite findings that this thing is political activity within the meaning of the rule, or that something else is not; and those are the interpretations which are included on this card." 86 Cong. Rec. 2948.

In response to these comments, the following colloquy between Senators Hatch and Brown took place (86 Cong. Rec. 2948):

> Mr. BROWN. Let me interrupt Senator. I ask the Senator if his substitute for section 15 relates to the interpretation of the rule [Civil Service Rule I]?
>
> Mr. HATCH. Yes.
>
> Mr. BROWN. Does it say so?
>
> Mr. HATCH. Yes; it says that the provisions of the act shall be deemed to prohibit the same activities on the part of the persons affected by it as the United States Civil Service Commission has heretofore determined are at the time of the passage of the act prohibited on the part of employees in the classified civil service, limiting it to that particular time.
>
> Mr. BROWN. Then, Mr. President, we not only are writing the rule into the statute——
>
> Mr. HATCH. But we are writing into the statute the interpretation of it.
>
> Mr. BROWN. But we are writing into the statute the interpretation of the Civil Service Commission.
>
> Mr. HATCH. Yes, exactly.

Thereafter, Senator Hatch clarified his answer to Senator Brown's last question by making it clear that the interpretations of Rule I which were incorporated into the statute were "the interpretations which appear on the card." 86 Cong. Rec. 2949.

The opponents of the legislation then suggested that it would be preferable for the Congress itself to define and specify the categories of prohibited conduct—for example, by taking the 18 statements on Senator Hatch's card and using them for the definition of political activity. See comments of Senator Brown at 86 Cong. Rec. 2949, 2951. The proponents of the bill expressed the view that, because the complex nature of the subject made it difficult to specify every type of conduct that would come within the intendment of the prohibition, and because the general concept, though difficult to define with comprehensive particularity, was clear enough in meaning and application to most situations, the approach of incorporation by reference of the principles developed by the Commission was preferable. Thus, Senator Barkley stated (86 Cong. Rec. 2952):

> * * * I will say to the Senator that, so far as I recall, Congress has never attempted in any of its civil-service laws to define what is pernicious political activity, for the situations are so variable, the facts are so different. Rarely, if ever, are the facts in two cases precisely alike. So I do not know how far Congress could go, or how wise it would be for Congress to define what is pernicious political activity. It is not like defining a utility or many other things which we do define by law. This is such a flexi-

ble term, depending on the facts in each case, that I believe Congress by undertaking to include certain things, might not include many other things which ought to be included, simply because of inability to think of all of them at once.

Senator George also defended the incorporation by reference approach (86 Cong. Rec. 2954):

Mr. BROWN. Now, let me read to the Senator what the Civil Service Commission said:

"Definition of political activity: It is impossible to give a complete list of the particular activities in which an employee may not engage."

Mr. GEORGE. Why, certainly it is, just as the courts throughout the ages have refused to define fraud, because they could not imagine every conceivable circumstance under which a practice would be fraudulent or in good faith. They knew very well that when they did define it, those who wanted to defraud would take advantage of the definition and get around it; so the courts have always said that no absolute, rigid, exhaustive, and exclusive definition of fraud could be made. They have put it upon the ground that all men might well understand—to wit, that the moment they defined fraud, the man who wanted to commit it would find his way around the definition.

Following this discussion, Senator Hatch's substitute version of Section 15 was passed (86 Cong. Rec. 2958), and, thereafter, the entire bill was approved by the Senate (86 Cong. Rec. 2987–2988). Section 15 was not disturbed by the House and appeared

in the enacted version of the bill in the form in which it passed the Senate. 54 Stat. 771.

When Title 5 of the United States Code was enacted into positive law in 1966 (see P. L. 89–554, 80 Stat. 378, 525), the language of Section 15 was somewhat revised. In its codified form, it provides (5 U.S.C. 7324(a)):

> For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

As can be seen, among other changes in the language, the words "before July 19, 1940" were substituted for the words "at the time this section takes effect." While the revised language in some part obscures the intent, which was plain on the face of the original version—namely, to adopt by reference only the then-current determinations of the Civil Service Commission—it is clear that Congress intended no substantive changes when it codified Title 5. As the Senate Report explained (S. Rep. No. 1380, 89th Cong., 2d Sess., pp. 20–21):

> Like other recent codifications which have been previously enacted into law and which will eventually result in the enactment of all 50 titles of the United States Code, *there are no substantive changes made by this bill enacting*

title 5 into law. It is sometimes feared or assumed that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation from which it can be inferred that a change of language is intended to change substance. The committee wishes to express that in a codification statute, however, courts uphold the contrary presumption: the statute is intended to remain substantively unchanged. [Emphasis added.]

2. Both prior and subsequent to the passage of the Hatch Act, the Civil Service Commission periodically published informational pamphlets which defined with particularity the proscriptions against political management and campaigning, as well as other restrictions on political activities of government employees. It was, in fact, a portion of the 1939 edition of the Commission's pamphlet on political activity (Form 1236) that Senator Hatch placed into the record during the debates on the 1940 amendments to the Act to explain the substantive prohibitions being incorporated into the Act by Section 15 (86 Cong. Rec. 2938–2940).

In 1970, the Commission promulgated regulations which specified in detail particular activities which the Act permits and which it prohibits. These specifications, which constitute a summary of the agency's interpretations of prohibited political activity contained in its pamphlets, are set forth in the Appendix,

infra, pp. 71–74. They list 13 specific kinds of activity in which an employee may engage and 13 types of activity which are prohibited. Among the permitted activities are such things are registering and voting, displaying a political picture, sticker, badge or button, attending a political gathering, or making a financial contribution to a political party or organization. Among the activities specifically prohibited are serving as an officer of a political party, soliciting or receiving contributions for partisan financial purposes, soliciting votes for or against a partisan candidate for public office or becoming a candidate, serving as a delegate to a political party convention, and driving voters to the polls on behalf of a partisan candidate.

As explained in theAppendix (*infra*, pp. 75–76), since the enactment of the Hatch Act the Commission has interpreted the prohibition against partisan political management and political campaigning consistently and in accordance with its decisions that were in effect in 1940 and that were consistent with the provisions of the Hatch Act itself.

3. Congress has made no significant changes in the Hatch Act since its enactment. In 1966, however, Congress established a Commission on Political Activity of Government Personnel, a bipartisan group which, after an extensive study, recommended liberalization of the political activity restrictions. Although a number of bills proposing such changes have been introduced, Congress has not acted. A summary of this recent legislative consideration of possible amend-

ment of the Hatch Act is set forth in the Appendix, *infra*, pp. 76–78.

B. THIS COURT'S DECISIONS UPHOLDING THE CONSTITUTIONALITY OF THE HATCH ACT

This Court upheld the constitutionality of the Hatch Act's restrictions on active political management and political campaigning in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (federal employees), and *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (state employees). In *Mitchell*, a number of individual federal employees and a labor union challenged the provision on the grounds that it violated their First, Fifth, Ninth, and Tenth Amendment rights by depriving them of freedom of speech and the right to engage in political activities, by unreasonably prohibiting them from carrying on activities lawfully permitted to others who were not government employees, by arbitrarily and unreasonably discriminating between covered and exempted federal employees, and because the prohibition was "so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful * * *." See 330 U.S. at 83, n. 12.

The Court first held that all but one of the plaintiffs failed to present an adjudicable case or controversy, because they had not actually engaged in prohibited activities and were not currently threatened with application of the sanctions of the Act. (*Id.* at 86–91). Since, however, one of the plaintiffs had in fact violated the restrictions and was facing discharge proceedings, the Court held that he presented a justi-

ciable controversy that could appropriately be resolved in the declaratory judgment proceeding (*id.* at 91–94). Considering his challenge, the Court upheld the constitutionality of the political management and campaigning restrictions. After reviewing prior cases in which similar constitutional challenges had been levelled against laws restricting political contributions,[5] the Court observed (*id.* at 98–100, 102–103):

> The provisions of § 9 of the Hatch Act and the Civil Service Rule I are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political contributions of energy by government employees. These contributions, too, have a long background of disapproval. Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.
>
> Another Congress may determine that, on the whole, limitations on active political management by federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Con-

[5] *Ex parte Curtis*, 106 U.S. 371; *United States* v. *Wurzbach*, 280 U.S. 396.

gress is not politically naive or regardless of public welfare or that of the employees. It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act.

The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of government employees have been accustomed to work in politics—national, state and local—as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not overactive politically. [Footnotes omitted.]

* * * * *

We have said that Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress.

> * * * Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

The Court also considered and rejected the contention that the restrictions, while perhaps constitutionally applicable to administrative and supervisory personnel, could not properly be applied to industrial personnel whose duties entail neither the making nor the execution of government policy (the plaintiff whose claim was under consideration was a roller in the Mint):

> * * * Nevertheless, if in free time (the employee) is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees, with positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress

> feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation. [*Id.* at 101.]

Finally, the Court refused to reach the facial attack on the statute for vagueness, holding that the conduct in question in the particular case before it was clearly constitutionally sanctionable (*id.* at 103–104).[*]

Since the *Mitchell* and *Oklahoma* decisions, the courts have had numerous opportunities to review the provisions of the Hatch Act and the Commission's administration thereof. In only one case (*Wilson* v. *U.S. Civil Service, Commission,* 186 F. Supp. 104 (D.D.C.)), has the Commission's interpretation of what constitutes restricted political activity under the Act been questioned. In *Wilson,* the Commission had found that a federal employee who wrote a letter to a newspaper with the intent to have it published and to dissuade voters from supporting a particular partisan political candidate had participated in a political campaign. The court overturned the Commission's action, finding that, in view of the statute's specific guarantee of the right of expression of opinion on political subjects and candidates, an isolated letter

[*] Justices Black and Rutledge dissented on the ground that the Act was overbroad and vague (330 U.S. at 104, 105–115). Mr. Justice Douglas dissented in part, concluding that a justiciable controversy was presented by all the plaintiffs and that the Act was invalid as applied to non-administrative employees (*id.* at 115–126). In the *Oklahoma* case, the Court upheld the constitutionality of the Hatch Act as applied to State employees working in federally funded programs.

could not fairly be considered active participation in a political campaign.

While other courts have occasionally overturned Civil Service Commission political activity decisions on procedural grounds,[7] the Commission's interpretation of the content of the restriction has otherwise consistently been upheld, and constitutional challenges to the Act have been uniformly rejected prior to the decision of the district court in the instant case.[8]

II. THE DISTRICT COURT MISCONSTRUED THE HATCH ACT IN HOLDING IT UNCONSTITUTIONAL

The path taken by the district court in reaching the conclusion that the Hatch Act's political activity prohibitions are impermissibly vague and overbroad, and that these defects warrant striking the statute down on its face, was marked by fundamental errors of statutory construction and application, including the court's conclusion that Section 15 of the Act incorporated by reference all pre-1940 determinations of the Commission, its view that the Act contained irreconcilably conflicting rules, and its refusal to evaluate the statute as authoritatively construed by the

[7] *Flanagan* v. *Young*, 228 F. 2d 466 (C.A.D.C.); *Gray* v. *Macy*, 239 F. Supp. 658 (D. Ore.), reversed, 358 F. 2d 742 (C.A. 9).

[8] *E.g.*, *Northern Virginia Regional Park Authority* v. *U.S. Civil Service Commission*, 437 F. 2d 1346 (C.A. 4), certiorari denied, 403 U.S. 936; *Fishkin* v. *U.S. Civil Service Commission*, 309 F. Supp. 40 (N.D. Cal.), appeal dismissed as untimely, 396 U.S. 278; *Kearney* v. *Macy*, 409 F. 2d 847 (C.A. 9), certiorari denied, 397 U.S. 943; *Engelhardt* v. *U.S. Civil Service Commission*, 197 F. Supp. 806 (M.D. Ala.), affirmed *per curiam* 304 F. 2d 882 (C.A. 5).

Civil Service Commission and the courts. A proper construction of the statute in these respects undercuts the basis for the court's finding of unconstitutionality.

A. THE STATUTE WAS ERRONEOUSLY CONSTRUED TO INCORPORATE ALL PRE-1940 DECISIONS OF THE COMMISSION

The threshold question in construing Section 15 of the Hatch Act is to determine what it was that Congress incorporated by reference in the definition of proscribed political activities. The majority below, reading the statute literally, concluded that the determinations incorporated into the Act were the entire body of "over 3,000 rulings made by the Commission between 1886 and 1940" (J.S. App. A, p. 4a) with respect to acts of political management or political campaigning which were at some point during that period prohibited to employees in the competitive service. If one accepts the majority's interpretation of the statute, then there would be problems to consider, for the entire body of pre-1940 administrative determinations of the Commission, made over the course of more than 50 years, contained rulings which were, in some cases, inconsistent and outdated.

We submit, however, that it is clear from the legislative history of Section 15 that Congress never intended to incorporate the entire body of pre-1940 rulings. Rather, the intent was to incorporate only those rulings that continued to represent viable interpretations of the restriction as of 1940, and the Commission has been correct in its consistent administration of the Act in accordance with this understanding. This is, in fact, precisely what Congress

said when it passed Section 15; it defined the proscription to apply to such activities "as the United States Civil Service Commission has heretofore determined *are at the time this section takes effect* prohibited * * *." (54 Stat. 771; emphasis added.) It was only with the codification of Title 5 into positive law in 1966 that the provision, by referring for the first time to "acts of political management or political campaigning which were prohibited" under determinations made by the Commission "before July 19, 1940"* (5 U.S.C. 7324(a)), was revised in a manner admitting of the interpretation applied by the district court. The 1966 revision was not, however, intended to work any substantive change in the law; to conclude otherwise requires a holding that Congress intended, in the 1966 codification, to revive outdated pre-1940 decisions that were of no effect under Section 15 as enacted. No such conclusion is warranted. On the contrary, in enacting Title 5 into positive law Congress specified that "there are no substantive changes made by this bill" (S. Rep. No. 1380, 89th Cong., 2d Sess., p. 20). See p. 26, *supra*.

Indeed, it was not the decisions themselves that were the primary source of the incorporated definition of prohibited political activities, but rather the then-current interpretation of the concept by the Commission. See 40 Ops. A. G. 14, 24–27 (1941). Congress did not have before it the actual decisions; it did have

*The revision would have been more accurate had it used the words "and in effect on" instead of "before".

before it the interpretation of the principles they embodied. These were summarized on a card that had been prepared by Senator Hatch and was circulated during the debate on Section 15. 86 Cong. Rec. 2943. The card contained a listing of 18 specific categories of prohibited political management and campaigning, covering the major forms of political activity affected by the restriction, and representing a distillation of the concept as it had evolved under the Civil Service Commission's administration of its Rule I. Senator Hatch also introduced into the Congressional Record a somewhat more detailed exposition of the prohibition as construed at that time by the Commission, in the form of an excerpt from the Commission's contemporary political activities pamphlet (86 Cong. Rec. 2938–2940).[10] While this construction of the prohibition derived from the Commission's decisions in political activity cases, the debate makes clear that it was the interpretation of the Commission, as reflected in the materials adverted to by Senator Hatch, rather than the decisions themselves, that Congress intended to incorporate. See 86 Cong. Rec. 2948. The individual decisions, if still viable in 1940, continued to be relevant to the extent that they reflected particular applications of the general principles described in the interpretive materials before Congress.

[10] It appears that the excerpt from the Commission's pamphlet was not actually available to the Senators during the debate, but was printed in the Record after the passage of Section 15 by the Senate. Senator Hatch's card summarizing the restriction in 18 points was distributed, however, and its intent specifically discussed during the debate.

B. THE STATUTE IS NOT INTERNALLY INCONSISTENT

The court below was of the view that the Act was internally inconsistent—*i.e.*, that it prohibited through the incorporation provision the exercise of rights which were expressly conferred upon federal employees elsewhere in the Act (J.S. App. A, p. 6a). The dissent, however, correctly concluded that "[s]uch a construction is not tenable," since it would "create the absurdity that activities specifically exempted from the Hatch Act in Sections 9(a) and 18 were, at the same time, prohibited by Section 15" (J.S. App. A, p. 27a).

Under a familiar rule of statutory construction,[11] the specific provision of Section 18 (now 5 U.S.C. 7326), securing the right to participate actively in non-partisan elections and campaigns, prevails over the general provisions of Section 15 (now 5 U.S.C. 7324(a)(2)), which was enacted at the same time. With respect to the specific provision of the third sentence of Section 9(a) of the original Hatch Act (now 5 U.S.C. 7324 (b)), securing to federal employees the right to express political opinions, the legislative history shows that Congress did not intend in Section 15 to incorporate those prior rulings which prohibited public expression of political opinions. See 86 Cong. Rec. 2870; 40 Ops. A. G. 14, 20-27 (1941).

This Court was aware during the *Mitchell* litigation that the Commission's pre-1940 rulings prohibited both non-partisan political activities and the public

[11] See *e.g.*, *MacEvoy* v. *United States*, 322 U.S. 102, 107; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208.

expression, *simpliciter*, of political opinions. See, *e.g.*, 330 U.S. at 100. Nevertheless, the Court apparently had no difficulty reading into the statute through Section 15 only so much of the Commission's pre-1940 body of law as was consistent with the express provisions of the Act. For, as the Court stated (*ibid.*):

> It is only *partisan* political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, *public or private*, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success. [Emphasis added.]

While a statute which expressly confers rights in one section, only to take them away in another, would present serious questions concerning validity on vagueness grounds, the Hatch Act does not suffer from that infirmity. Neither this Court in *Mitchell*, nor the Civil Service Commission, which in its regulations emphasizes those employee rights not circumscribed by the Act, has given the Act such a construction.

By construing the Act so that outdated determinations by the Commission and determinations inconsistent with the Act's express authorization of participation in non-partisan political activities and public expression of views on political subjects and candidates are not incorporated by Section 15, most of the problems of uncertainty perceived by the district court evaporate. Of the 16 examples culled by the court from the Commission's pre-1940 decisions to

illustrate the "sweep and indefiniteness" of the rulings and their indefensibility as "against the strictures of the First Amendment" (J.S. App. A, p. 4a), all but three manifestly involve no Hatch Act violations.[12] With respect to those three items (publishing a political article (#8); allowing one's name to be associated with a political affair (#15); and being the author of an anonymous political communication (#16)), their status as prohibited political activities would turn on the particular facts surrounding the activity, and the applicability or inapplicability of the campaigning and management prohibition would clearly emerge from the facts in most instances.[13]

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[12] Most of the items listed by the court (*i.e.*, ##2–7 and 9–14) represent at most public expressions of opinion of the sort expressly protected in Section 9(a) of the Hatch Act (now 5 U.S.C. 7324(b)), particularly in light of the liberal construction afforded the language protecting such expressions in *Wilson* v. *United States Civil Service Commission*, 136 F. Supp. 104 (D.D.C.), the principles of which are today followed by the Commission (see Mondello affidavit, App. 56). Wagering on an election (#1), is viewed by the Commission as not being partisan activity, and therefore not prohibited by the Hatch Act, and some of the other 16 items might also fall within the exception for non-partisan political activity (*e.g.*, #13).

[13] For example, a federal employee who writes a flyer urging the election of a partisan candidate, knowing that the flyer is to be given mass distribution as part of the candidate's campaign literature, would violate the restriction, since this would be a clear case of political campaigning going beyond expression of opinion on a political subject. On the other hand, a letter to the editor of a newspaper would be permitted expression of opinion.

C. THE DISTRICT COURT ERRED IN FAILING TO GIVE EFFECT TO THE CIVIL SERVICE COMMISSION'S CONSTRUCTION OF THE STATUTE.

If all that an employee of ordinary intelligence could look to in order to ascertain what conduct Congress prohibited in the Act were a compilation of pre-1940 administrative rulings,[14] the statute might be vague and imprecise—though it may be observed that one who needs to know the law in many fields must depend ultimately on what is found in hundreds of volumes of this Court's reports. But those covered by the Hatch Act are not now, and never have been, required to interpret this mass of pre-1940 administrative materials themselves in order to ascertain what the Act prohibits. Rather, since the Hatch Act was enacted in 1939 (and for some period prior thereto), the Civil Service Commission has periodically published pamphlets and other documents defining with particularity the conduct prohibited by the Act.

Two of the earliest such publications under the Act—the 1939, and 1944 versions of a pamphlet entitled "Political Activity and Political Assessments of Federal Officeholders and Employees" were—before this Court as part of the record in *United Public Workers* v. *Mitchell*, No. 20, O. T., 1946.[15] In this Court's deci-

[14] Pursuant to respondents' request, we have lodged with the Clerk ten additional sets of the three-volume compilation of pre-1940 Civil Service Commission rulings, which is part of the record on appeal.

[15] The 1944 pamphlet and portions of the 1939 pamphlet were reproduced in the "Transcript of Record" filed in *Mitchell*, commencing, respectively, at pages 36 and 71.

sion in *Mitchell*, there are several references to these documents, which make it clear that the Court then deemed it proper to rely upon the Commission's published interpretations of the pre-1940 rulings to ascertain the meaning of Section 15. See, *e.g.*, 330 U.S. at 100, n. 36. Moreover, Congress itself relied upon the Civil Service Commission's interpretation of the pre-1940 rulings, as summarized, ~~and~~ on the card circulated by Senator Hatch, not the rulings themselves, when it enacted Section 15. See pp. 36–37, *supra*.

In testing whether a statute is unconstitutionally vague or overbroad, this Court will examine whether it has been "authoritatively construed" so that a "'satisfactory limiting construction'" is placed on the statutory language. *Gooding* v. *Wilson*, 405 U.S. 518, 520–521. See also, *e.g.*, *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 162–163 (administrative construction); *United States* v. *Harriss*, 347 U.S. 612 (construction by this Court). Compare *Cox* v. *Louisiana*, 379 U.S. 536, 555–558; *Edwards* v. *South Carolina*, 372 U.S. 229; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 608–609; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147. This rule is particularly applicable here, where the Act incorporates by reference a pre-existing administrative construction. Cf. *United States* v. *Sharpnack*, 355 U.S. 286. Where such a construction has been provided by the officers or agency charged with administration of the statute, it will be accorded "great deference" by the courts. *Udall* v. *Tallman*, 380

U.S. 1, 16; *Perkins* v. *Matthews*, 400 U.S. 379, 391; see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *United States* v. *City of Chicago*, 400 U.S. 8, 10.

The district court considered itself free to ignore the foregoing precepts and to disregard the Commission's regulations and other post-enactment interpretations of the political management and campaigning restriction. It did so because of its conclusion that Congress had expressly denied the Commission authority "to create essential clarity out of the general, imprecise prohibition enacted" (J.S. App. A, p. 9a). This conclusion misinterprets what Congress did. The original version of Section 15 reported out of the Senate committee would have conferred rule-making authority on the Commission in defining prohibited acts of political management and campaigning, but when opponents of the Hatch Act challenged this rule-making provision as an unconstitutional delegation of legislative power to the Commission, the incorporation-by-reference approach was substituted. See pp. 20–21, *supra*. All that this signified, however, was a congressional unwillingness to give the Commission a free hand to redefine, and possibly to expand, the scope of the prohibition (see, *e.g.*, 86 Cong. Rec. 2928); instead, Congress chose to establish the definitional standard itself, basing it upon the Commission's contemporary interpretation of prohibited political management and campaigning.

The fact that Congress itself set the standard for prohibited conduct by reference to Commission rulings does not indicate that Congress expected the Commis-

sion to cease publishing its summaries of prohibited political activities, or that those covered by the Hatch Act could not look to such publications for a definitive statement of their obligations and responsibilities under the Act. Indeed, that Congress expected reliance on the Commission's interpretation is confirmed by the fact that Congress relied upon these same materials when it enacted Section 15.

At all events, as the agency charged with the ultimate responsibility for enforcing the Hatch Act's ban on political activity, the Commission necessarily has authority to interpret the statute and to proceed on the basis of those views until the courts reject them. As one court has observed:

> "In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so. * * *"

American President Lines, Ltd. v. *Federal Maritime Commission,* 316 F. 2d 419, 422, n. 5 (C.A.D.C.), quoting from *Report of the Attorney General's Committee on Administrative Procedure,* pp. 99–100 (1941). See generally *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140; 1 Davis, *Administrative Law Treatise* 302 (1958).

The district court should, therefore, have evaluated the claims of vagueness and overbreadth against the statutory prohibition as construed in the post-enactment decisions and regulations of the Civil Service Commission.

III. THE HATCH ACT, PROPERLY CONSTRUED, IS NOT UNCONSTITUTIONALLY VAGUE

The purpose of the constitutional doctrine of vagueness—upon which the court below relied as one of the grounds for invalidating the Hatch Act—is to place governmental regulation of First Amendment activities within legitimate bounds by requiring a clear statement of the prohibitions the statute imposes.[18] This particularization of governmental power, whether accomplished in the drafting of the statute or through subsequent judicial or administrative interpretations, serves several important interests. These interests recently were summarized in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–109:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reason-

[18] In one sense, any inhibitory statute which incorporates by reference a specific body of extant law (whether in the form of administrative rulings, judicial decisions, or other statutes), is facially vague and imprecise. This, however, does not make the statute constitutionally infirm, since the statute is to be read in connection with the material which it incorporates—here, the Civil Service Commission's interpretations of the political management and campaigning restriction, reflected in its pre-1940 rulings. Thus, in *United States* v. *Sharpnack*, 355 U.S. 286, 293, which involved a challenge on constitutional grounds to the Assimilative Crimes Act of 1948, 18 U.S.C. 13, this Court pointed out that "[w]hether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves."

able opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' * * * than if the boundaries of the forbidden areas were clearly marked." [Footnotes omitted.]

As we now show, the "important values" which the vagueness doctrine is designed to safeguard are also preserved here. More specifically, the ban against political activity contained in the Hatch Act has been construed by the Civil Service Commission in a manner giving "the person of ordinary intelligence a reasonable opportunity to know what is prohibited;" the Act provides the Civil Service Commission with "explicit standards" for enforcement; and the Act does not have an impermissible inhibitory effect on the exercise of First Amendment rights because of vagueness.

a. The Hatch Act, as construed by the Commission gives fair notice of what it prohibits. The Commis

sion's present regulations interpreting the statutory prohibition, which the court below ignored, explicitly list 13 permissible activities and 13 prohibited activities (see App., *infra*, pp. 71–74). These listings encompass most of the common forms of political activity in which government employees are likely to consider engaging and thereby provide accurate and effective notice of the principal applications of the prohibition.[17] It is clear from this Court's past treatment of vaguéness issues that its principal concerns are pragmatic—is the statute in fact so drafted, construed, and applied that it presents a substantial actual danger of impeding lawful engagement in First Amendment activities? The district court erred in ignoring the role played by the regulations in giving meaningful and effective content and limits to the political activities prohibition.

Of course, the listing of prohibited activities in Section 733.122 (5 C.F.R.) of the Commission's regulations is not a complete catalogue of all conduct that could come within the Hatch Act's prohibition against partisan political management or campaigning. Partisan politics in the United States is composed of a complex and multi-faceted variety of activities; moreover, the concept and scope of political activity changes with the passage of time and the growth and development of

[17] The Commission does not rely on the existence of the regulations as the sole means of communicating the contents of the prohibition to interested government employees. It has an active program of information through widespread distribution of brochures, leaflets, and posters that explain the restriction in simple and comprehensible language.

our political institutions. Given the lawfulness of the prophylactic principle underlying the Hatch Act (the substantive constitutionality of which is not material to the vagueness inquiry), it is unreasonable and unnecessary to demand a precisely stated list of all proscribed activities.

The district court was troubled by the difficulty of drawing a precise line between permitted expression of opinion and prohibited campaigning (J.S. App. A, pp. 8a–9a). There are, concededly, borderline cases in which it may be difficult to determine whether the activity falls within the proscription. This is, however, an inherent characteristic of the subject matter rather than the product of any defect of vagueness in delimitation of the proscription. For example, a government employee at a social gathering can freely express his political opinions to others present; on the other hand, if a series of such gatherings is arranged for the purpose of informing those in attendance of the merits of a partisan candidate, and the employee attends each for the purpose of speaking on behalf of the candidate, a clear case of prohibited campaigning would be made out. The precise point at which permitted expression of views crosses the boundary into prohibited campaigning can hardly be described in advance in a manner covering every intermediate factual situation; yet, knowing the facts of a specific case, the applicability of the prohibition to the conduct will usually clearly emerge.[18]

[18] Congress specifically considered and rejected the possibility of trying to list specific restrictions itself, preferring the incorporation-by-reference approach. See pp. 24–25, *supra*.

While it may be appropriate to resolve borderline cases in favor of the employee under an expansive reading of the statutory provision protecting the employee's right to express his views—as was done in *Wilson* v. *United States Civil Service Commission, supra*—it is inappropriate to invalidate the statute on its face because it deals with a subject matter that does not admit of precise line-drawing covering all imaginable contingencies. As the Court pointed out in *United States* v. *National Dairy Products Corporation*, 372 U.S. 29, 32, "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." See also *United States* v. *Harriss*, 347 U.S. 612.

The Commission has gone further than issuance of descriptive regulations and circulation of explanatory literature in providing means for ascertaining the contents of the prohibition. Should a particular employee contemplate political action that is not expressly covered in either of the listings set forth in the regulations, he may obtain an advisory opinion from the Civil Service Commission's Office of General Counsel as to the applicability of the Hatch Act to his action.[19] While the presence of such a procedure is not necessary to establish the facial constitutionality of the

[19] According to the General Counsel's affidavit (App. 54):

"The Information Unit [in the Office of General Counsel] answers inquiries, from whatever source, concerning the application of the Hatch Act, Rule, and regulations. It is estimated that some five hundred written requests for political activity opinions are received annually. It is further estimated

statute, its availability diminishes substantially any vice of uncertainty that may remain with respect to interstitial situations not clearly covered by the Commission's interpretive regulations. The advisory opinion procedure thus helps to satisfy the interest in fair warning which the vagueness doctrine is designed to assure. Cf. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 49.

b. The provisions of the Hatch Act, through the statutory language and as authoritatively construed by this Court, do provide "explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108. Certain fundamental principles are declared by the statute: an employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates" (5 U.S.C. 7324(b)); additionally, non-partisan political activity is expressly allowed (5 U.S.C. 7326). See *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 99, 100. Further, "[i]n order to give the Civil Service Commission adequate standards to measure active participation in political activities" (*Oklahoma* v. *Civil Service Commission*, *supra*, 330 U.S. at 144), Congress in Section 15 ordered that the phrase, "active part in political management or in political campaigns" be defined in terms of the Commmission's interpretation of the prohibition in

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that telephone requests for information account for another four hundred informal opinions each year."

See App. 58–68, the several advisory opinions which were annexed to the General Counsel's affidavit for purposes of illustration.

1940. Indeed, the rejection of the original Senate Committe version of Section 15, under which the Commission would have had rule-making power to define prohibited political activities, was motivated by a congressional desire to limit the Commission's discretion in applying the prohibition. See pp. 20–21, *supra*.

Moreover, the Commission, by publishing regulations which give its interpretation of the statute, has imposed standards upon itself from which it is not free to deviate in particular cases. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535, 539.

The kind of "uncontrolled discretion" of a policeman on the beat or prosecutor that troubled the Court in such cases as *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, *Coates* v. *City of Cincinnati*, 402 U.S. 611, and *Staub* v. *City of Baxley*, 355 U.S. 313, 322, thus is not present in the administration of the Hatch Act. On the contrary, the Commission must be and is guided by a substantial body of its own precedents and regulations. That their application to a particular factual situation may be uncertain from time to time in no way differentiates the administration of the Hatch Act from that of countless other laws and regulations that courts and agencies daily interpret and apply. This common characteristic of the legal process, requiring the application of general principles and precedents to specific factual circumstances, does not give rise to the kinds of opportunities for administrative abuse that would warrant facial invalidation of the statute for vagueness.

c. The third principle of the vagueness doctrine, as summarized by this Court in *Grayned, supra,* is that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] fredoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" * * * than if the boundaries of the forbidden areas were clearly marked.' " 408 U.S. at 109. As previously mentioned, the Civil Service Commission's published regulations authoritatively construe the language of the Hatch Act and give employees substantial notice of what constitutes proscribed conduct, covering all of the most common types of prohibited activities.

To avoid inhibiting employees in the exercise of their First Amendment rights, the Commission, at 5 C.F.R. 733.111, has also specifically listed those common political activities in which federal employees may engage. Further, if an employee is in doubt whether contemplated activity is prohibited, he may obtain an advisory ruling from the Commission.

The potential for uncertainty is thus minimized and confined to a relatively few uncommon or borderline situations. It is the nature of the subject matter itself that makes greater precision practically unattainable. Once one accepts as constitutional the congressional decision to preserve the political neutrality of the civil service by means of a prophylactic prohibition against active, partisan political campaigning, the manner in which the prohibition has been described and implemented in the administration of the

Hatch Act, within the limitations inherent in the subject matter, satisfies the requirement of specificity.

Finally, with regard to the problem of vagueness, we believe the district court erred in approaching the matter from an abstract and theoretical standpoint rather than through a consideration of the real situation of the government employee seeking to engage in political activities. Suppose Congress were to enact the Civil Service Commission regulations as the definition of prohibited political activities. Would that cure the vagueness problem? The opinion below sheds little light on that question, since the district court considered the statutory language without resort to or analysis of the interpretive regulations. We suggest that such a statute would not be unconstitutionally vague; we further suggest that the enactment of such a statute would have no practical impact upon the application of the principles underlying the vagueness doctrine, since government employees would have the same guidance regarding permitted and prohibited activities that they now enjoy.

The vagueness issue should have been determined with reference to the regulations and other materials and procedures available to guide employees in their political activities. So considered, the prohibition is not unconstitutionally vague.

IV. THE HATCH ACT, PROPERLY CONSTRUED, IS NOT OVERBROAD

Closely related to the vagueness doctrine is the doctrine of "overbreadth," which the court below also

relied upon in striking down the Hatch Act. For the most part, our arguments that the Act is not unduly vague answer the overbreadth challenge as well.

The doctrines of vagueness and overbreadth have both been used by this Court to invalidate statutes which deter the exercise of conduct that the First Amendment protects. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *N.A.A.C.P.* v. *Button*, 371 U.S. 415.

An overbroad statute is one which covers some activity that may constitutionally be regulated as well as some that may not be. In many cases, the latter conduct is covered not because the legislature intended to reach such activity, but because the prohibitions are couched in general or generic terms. Where this is the case, an authoritative narrowing construction which excludes constitutionally protected conduct from coverage will save the statute from facial invalidation. See, *e.g.*, *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Rumley*, 345 U.S. 41; cf. *Younger* v. *Harris*, 401 U.S. 37, 50–51. In the instant case, no "narrowing" construction is required to save the statute—merely a construction that fairly reflects the congressional intent.

We have shown above that the Civil Service Commission regulations have clarified Section 15 to a degree that a covered employee of ordinary intelligence is unlikely to be deterred from exercising his First Amendment rights because of uncertainty. To

be sure, the fact that a statute is not vague does not necessarily mean it is not overbroad. Indeed, this Court recently pointed out that "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford,* 408 U.S. 104, 114. Here, however, the Commission's interpretative regulations have not only made Section 15 "clear and precise," but they have also removed any overbreadth that might have inhered in the statute in its uninterpreted form.

This is because the vice of overbreadth normally arises when the effective provisions of a statute are couched in broad generic terms that literally encompass privileged activity along with conduct that can be regulated. Such statutes, if they have not been or cannot be narrowly construed, may be invalidated in order to put an end to their tendency to suppress constitutionally protected rights. See, *e.g., Coates* v. *City of Cincinnati,* 402 U.S. 611. But the Hatch Act, as construed by the Commission, does not establish a singular prohibition, generically described, which, although it might be definitive enough to avoid invalidation on vagueness grounds, sweeps so broadly that it may include activity not amenable to regulation. Rather, the Commission has refrained from an all-encompassing description of prohibited activity, and, instead, has explained what the Hatch Act prohibits by listing specific prohibited acts. By particularizing the pro-

hibition in this manner, the Commission has eliminated any possible overbreadth in the Act as a whole.

The court below did not independently analyze the overbreadth issue; instead, it linked the concept with that of vagueness, alluding to "sweep and indefiniteness" (J.S. App. A, p. 4a) or "overbreadth and attendant vagueness" (*id.* at 11a). The perceived overbreadth could theoretically reside in the Act's incorporation of outdated pre-1940 decisions that were not adopted by Congress, and are not in fact being applied by the Commission in its administration of the political activity prohibition. Or it could be found i nthe Act's application, as administratively construed, to activities which the court thought could not constitutionally be proscribed. The opinion suggests that the overbreadth finding was predicated upon the former supposed defect, since it speaks of "rigidly incorporated prior rulings" (*id.* at 9a) and utilizes illustrations that, by and large, are outside the scope of the prohibition as intended by Congress and as administered by the Commission (*id.* at 5a; see pp. 39–40, *supra*).

The Act is not overbroad by virtue of incorporation of pre-1940 rulings prohibiting activities that would today be considered beyond the constitutional power of Congress to forbid. As we have previously indicated, this argument is premised upon an erroneous construction of the statute, which was intended not to effect a "rigid incorporation" of all pre-1940 determinations by the Commission, but rather to incorporate the Commission's contemporaneous interpretation,

further modified by the guarantee of the right to public expression of opinion on political subjects and candidates and to participation in non-partisan elections. See Part II, *supra*, pp. 34–44. Thus, those prior rulings that appear to infringe "the constitutional right to state opinion" (J.S. App. A, p. 9a) should properly have been held not to have been incorporated in the definition of prohibited political activities; they provide no basis for a finding that the Hatch Act is overbroad.

There remains the question whether the statute as properly construed nevertheless contains substantial unconstitutional restraints upon the exercise of First Amendment rights by government employees. This question, which concerns the "substantive" issue of congressional power to adopt prophylactic measures against partisan political activity by government employees rather than the "procedural" issue of the constitutional adequacy of the prohibition as drafted and applied, was not litigated in or reached by the district court. It should not be considered here. See Part VI, *infra*.

V. THE DISTRICT COURT ERRED IN STRIKING THE STATUTE DOWN ON ITS FACE

Even if there were some valid basis for concern about the constitutionality of the Hatch Act's restrictions against political management and campaigning in some particulars, it does not follow that the proper remedy is facial invalidation, which results in

a wholesale elimination of much that is clearly valid and necessary to the maintnance of an impartial federal civil service. As we have argued above, the statute is not, properly construed, constitutionally infirm; but, in any event, the drastic remedy of facial invalidation is not an appropriate judicial response to any defects that may be perceived, since less drastic means are available and appropriate to avoid unconstitutional applications of the prohibitions or impermissible inhibitory effects on protected First Amendment activities.

To some extent, resolution of the question turns on technical considerations. Is there a feasible way to eliminate or excise the constitutionally objectionable aspects of the statute without so eviscerating it that it ceases to serve the legitimate objectives that motivated its enactment? In this case, the statute as construed is made up of a series of discrete, self-contained prohibitions, each of which is effectively severable from the others. Thus facial invalidation is unnecessary, and if there are objectionable provisions, a narrower process of excision is to be preferred. See *United States* v. *Jackson,* 390 U.S. 570, 585–586. In other words, if, for example, the restriction on circulating a partisan nominating petition (Section 122(b)(13), 5 C.F.R. 733, of the Commission's political activity regulations) or on soliciting votes in support of a partisan candidate (Section 122(b)(7)) were viewed as invalid, it is unnecessary to the fostering of protected

First Amendment rights simultaneously to strike down other, permissible restrictions such as those against serving as an officer of a political party (Section 122 (b)(1)), soliciting or receiving contributions for a partisan political purpose (Section 122(b)(3)), or becoming a partisan candidate for elective public office (Section 122(b)(6)).

Congress has indicated its intention to preserve valid portions of the legislation in the event of partial invalidation. When enacted in 1939, the Hatch Act provided, in Section 11 (53 Stat. 1149):

> If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

This provision was originally codified at 18 U.S.C. (1940 ed.) 61k. However, when Title 18 was enacted into positive law in 1948, the severability provision was repealed as unnecessary. See Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862. This apparently occurred because the various provisions of the Hatch Act were scattered at different locations in Titles 5 and 18, which made the severability provision awkward. But the congressional intent reflected by the provision should be respected.

The question of the propriety of facial invalidation should also be considered against the background of

the importance of the governmental interests that the Hatch Act serves and the nature of the restrictions that it imposes upon First Amendment activities. Here, Congress has not adopted a blanket prohibition on political activity and expression. The right to vote and the right to express opinions on all political subjects and candidates has been carefully preserved. The scope of the restrictions has been further tailored to the perceived necessities of the problem by allowing full participation in a broad range of non-partisan political matters.

The restrictions that Congress did impose were deemed necessary to serve vital governmental objectives in maintaining an efficient and impartial civil service. Furthermore, the restrictions themselves foster significant First Amendment values by protecting the democratic political process from the potential evil of a civil service mobilized in support of partisan political goals and by protecting the individual civil servant from direct or subtle coercion to engage in unwanted political activity. Where legislation or regulation imposing some restrictions upon First Amendment activities is reasonably related to the accomplishment of such important and meritorious objectives, facial invalidation is ordinarily not used as a remedy for constitutional defects that may arise from the regulatory scheme. Compare *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 395–396, and *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 620, with *Coates* v.

City of Cincinnati, 402 U.S. 611, and *United States* v. *Robel*, 389 U.S. 258.

VI. *MITCHELL'S* HOLDING THAT CONGRESS MAY CONSTITUTIONALLY PROHIBIT ACTIVE, PARTISAN CAMPAIGNING BY GOVERNMENT EMPLOYEES SHOULD NOT BE RECONSIDERED IN THIS CASE

The complaint in this proceeding can arguably be read to have challenged not only the alleged vagueness and overbreadth of the Hatch Act's restrictions on partisan political management and campaigning, but also the underlying constitutionality of the restrictions themselves (see paragraph 27c of the complaint, App. 11). However, the parties did not litigate the merits of the political activity restrictions as interpreted and applied by the Civil Service Commission, and the district court confined its decision to the facial validity of the statute. In fact, the court below explicitly recognized the "appropriateness" of the governmental objective to prevent government employees from taking an active part in poltical management and campaigning (J.S. App. A, p. 3a).

The basic question was decided in *Mitchell*. That case has become a part of the fabric of our constitutional law. There is no occasion for re-examining that decision. If there are matters of detail which were not decided in the *Mitchell* case, if there are particular portions of the Commission's regulations or particular applications of the prohibition which raise undecided questions, those matters are best left to resolution on a case by case basis in the context of specific alleged violations. Cf. *Laird* v. *Tatum*, 408 U.S. 1.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed and the complaint dismissed.

Respectfully submitted.

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APPENDIX

Regulation of Political Activities of Federal Government Employees

A. REGULATION PRIOR TO THE HATCH ACT

The principle of merit in public employment, which underlies the Hatch Act,[1] emerged early in our history and was given expression by several of our early Presidents, who strived for the establishment and preservation of a federal civil service system based upon merit. At the same time, however, forces existed that made it difficult, and at times impossible, to maintain a truly impartial, non-partisan civil service. See generally Kaplan, *The Law of Civil Service* 1–29 (1958); Friedman and Klinger, *The Hatch Act: Regulation by Administrative Action of Political Activities of Government Employees*—I, 7 Fed. Bar J. 5 (1945); Howard (*Federal Restrictions on the Political Activity of Government Employees*, 35 Am. Pol. Sci. Rev. 470 (1941).

Thus, even while George Washington "banned nepotism, and denied employment to veterans of the Revolution if they were not qualified for the positions they sought" (*Kaplan, op. cit. supra,* p. 1), he

[1] The Hatch Act, formally known as "An Act to Prevent Pernicious Political Activity," was originally enacted on August 2, 1939, ch. 410, 53 Stat. 1147–1149, and was amended on July 19, 1940, ch. 640, 54 Stat. 767–772. Various provisions of the Act have since been codified in Title 18 and Title 5 of the United States Code (the latter including all provisions under consideration in this case).

stressed geographical distribution in appointmer
and relied heavily upon Congressional recommend
tions in making his appointments. Both practices p
sisted beyond Washington's incumbency and, wh
seemingly innocuous, provided a basis for what w
essentially appointment on a political patronage ba
(*id.* at 2).

Complementing such general practices was the p
sage in 1820 of the Four Year Tenure of Office A
which provided that the terms of many officials we
to be for four years, at the end of which time th
were to turn in their accounts. "Though ostensibly
fiscal measure, it soon became an excuse for who
sale removal of incumbents, whether or not th
accounts were in order or whether or not they h
any accounts to submit." *Id.* at 3. Not surprising
"[t]his act, with the doctrine of rotation in off
* * *, became the cornerstone of the spoils syst
which reached its apex in the mid-19th centur
(*ibid.*).

At the same time, however, the spoils system w
perceived by most as an obstacle to good governme
for a number of reasons, including the fact that th
who were appointed on a patronage basis were oft
inefficient or even wholly incompetent. Beyond th
however, the spoils system was damaging becau
those who achieved office under it often had partis
allegiences which were more strongly felt than w
their responsibilities as public servants. This,
course, created the danger that such employees mi
subordinate the public's interest to that of the par
As one measure to guard against this possibility,
strictions in various forms have been traditiona
imposed upon the political activities of employees
the executive branch of the federal government.
generally Friedman and Klinger, *The Hatch A*

Regulation by Administrative Action of Political Activities of Governmental Employees, supra, at 6–8.

As early as 1801, the heads of the executive departments, at the direction of President Jefferson, issued an order stating:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments. * ,* * [I]t is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it. [10 Richardson, *Messages and Papers of the Presidents* 98–99 (1899); Congressional Globe, 25th Cong., 3d Sess., Vol. 7, Appendix, p. 405, 86 Cong. Rec. 2433–2434.]

Forty years later, Secretary of State Daniel Webster issued the following order to department heads at the direction of President William Henry Harrison:

> SIR: The President is of opinion that it is a great abuse to bring the patronage of the General Government into conflict with the freedom of elections, and that this abuse ought to be corrected wherever it may have been permitted to exist, and to be prevented for the future.

He therefore directs that information be given to all officers and agents in your department of the public service that partisan interference in popular elections, whether of State officers or officers of this Government, and for whomsoever or against whomsoever it may be exercised, or the payment of any contribution or assessment on salaries, or official compensation for party or election purposes, will be regarded by him as cause of removal.

It is not intended that any officer shall be restrained in the free and proper expression and maintenance of his opinions respecting public men or public measures, or in the exercise to the fullest degree of the constitutional right of suffrage. But persons employed under the Government and paid for their services out of the public Treasury are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it; * * *. [4 Richardson, *Messages and Papers of the Presidents* 52 (1897).]

Again, on June 22, 1877, President Hayes promulgated the following rule "applicable to every department of the civil service": [2]

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[2] By the Act of March 3 1871, ch. 14, § 9, 16 Stat. 514, Congress authoried the President to prescribe regulations for the creation of a civil service of federal employees. That law, which has been codified and remains in effect today, provides (5 U.S.C. 3301):

"The President may—

"(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

"(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

"(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section."

No officer should be required or permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns. Their right to vote and to express their views on public questions, either orally or through the press, is not denied, provided it does not interfere with the discharge of their official duties. No assessment for political purposes on officers or subordinates should be allowed. [7 Richardson, *Messages and Papers of the Presidents* 450–451 (1898).]

This general problem, which had long been the con-
ern of Presidents, was dealt with by Congress for
he first time in the Civil Service Act of 1883, ch. 27, 22
tat. 403.[3] The Act created the Civil Service Commis-
on as the agency to administer the civil service un-
r the President. The Act also declared that "no
rson in the public service is for that reason under
y obligations * * * to render any political service,"
d does not have "any right to use his official au-
rity or influence to coerce the political action of any
rson or body." 22 Stat. 404.

The Act empowered the President to promulgate
les for carrying this act into effect." Pursuant to
authority, and that contained in the Act of March 3,
, President Arthur, on May 7, 1883, promul-
d the original Civil Service Rules. As then pro-
gated, the rules contained no specific prohibition
nst participation by federal employees in politi-
campaigns. Rather, they merely restated the lan-
e of the Act, providing in Rule I that "[n]o

[3] Between 1865 and 1880, both congressional and public out-
over patronage practices began to mount. This agitation
form culminated in 1883 with the passage of the Civil
e Act, commonly referred to as the Pendleton Act. See
n, *op. cit. supra*, pp. 9–10.

person in [the executive civil] service shall use his official authority or influence either to coerce the political action of any person or body or interfere with any election." 8 Richardson, *Messages and Papers of the Presidents* 161 (1898). Thereafter, on July 14, 1886, President Cleveland issued an executive order in which he warned federal employees "against the use of their official positions in attempts to control political movements in their localities." *Id.* at 494–495. Nonetheless, as one writer has explained, President Cleveland's directive was not effective in abating federal employee participation in political activities:[4]

> Because of the fact that the order was enforceable by department heads rather than by the Civil Service Commission, there was no uniformity in its application.

In 1907, President Theodore Roosevelt issued Executive Order No. 642, which provided in part as follows:

> No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns [Twenty-fourth Annual Report of the Civil Service Commission, p. 104 (1907).]

The language of this order was promptly incorporated into Civil Service Rule I, which continued in effect without change until the passage of the Hatch Act in 1939.

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[4] *Howard, supra*, 35 Am. Pol. Sci. Rev. at 474.

The reasons for this amendment were set forth in the 24th Annual Report of the Civil Service Commission (pp. 7–8):

> The operation of the civil-service law in substituting a merit for a party test in appointments has greatly lessened abuses arising from the partisan activity of officeholders. This, however, while correcting the abuse of partisan activity in obtaining office, did not entirely correct the abuse of such activity of those in office. The civil-service act does not forbid political activity further than to declare that no person in the public service is for that reason under any obligation to contribute to any political fund or to render any political service, and that no such person has any right to use his official authority or influence to coerce the political action of any person or body. The rules, in addition to affirming these provisions, forbid persons in the service from using their authority or influence for the purpose of interfering with an election or affecting the result thereof, and prohibit discrimination by any person in the service in favor of an applicant, eligible, or employee because of his political opinions.

This statement indicates that after 24 years of experience the Civil Service Commission concluded that the prohibitions in the Act and Rule against using official authority or influence to coerce the political action of others or interfere with elections did not suffice to control improper political activity by those in office.

On June 24, 1938, President Franklin Roosevelt issued an Executive Order authorizing the Commission to require disbursing officers to withhold the salary of classified employees who were not removed after being found in violation of the rule against political activity. Previous to this time, the Commission had

no independent power to enforce the rule; its function was limited to the investigation of reported violations and the making of findings and recommendations to the head of the Department concerned indicating the disciplinary action, if any, the Commission considered appropriate. See Fifty-Sixth Annual Report of the Civil Service Commission p. 47 (1940); *Howard, supra*, 35 Am. Pol. Sci. Rev. at pp. 474–475.

Although, as indicated, the Commission's enforcement powers had been limited, the concept of prohibited political activities under Rule I had been applied and refined by the Commission in case-by-case determinations upon investigations of alleged violations during the period from 1886 to the passage of the Hatch Act in 1939–1940. The concept thus evolved in much the same manner as common law principles evolved through judicial decisions. During this period, the Commission decided more than 2600 cases involving alleged political activity violations.

In many of these cases, the Commission was also considering charges of other violations, so that it is not possible to ascertain whether disciplinary action recommended by the Commission was based on the political activity charges. Moreover, in many of the cases, particularly earlier ones, the decision did not specify the type of political activity involved, so that it was of little precedential value (see 1 *Political Activity Reporter*, p. i (1971)). Nevertheless a large number of the decisions contain discussion and elucidation of the content of the political activity prohibition—in other words, at the time the Hatch Act was enacted the meaning of Civil Service Rule I was generally understood, although its application to particular cases of a borderline character may not in every instance have been clear.

B. THE CIVIL SERVICE COMMISSION'S ADMINISTRATION OF THE HATCH ACT

Both prior and subsequent to the passage of the Hatch Act, the Civil Service Commission periodically published informational pamphlets which defined with particularity the proscription against political management and campaigning, as well as other restrictions on political activities of government employees.[5] It was, in fact, a portion of the 1939 edition of the Commission's pamphlet on political activity (Form 1236) that Senator Hatch placed into the record during the debates on the 1940 amendments to the Act to explain the substantive prohibitions being incorporated into the Act by Section 15 (86 Cong. Rec. 2938–2940).

In 1970, the Commission promulgated regulations (5 C.F.R. Part 733) constituting a distillation of the interpretation of prohibited political activities contained in the pamphlets. In Section 733.111, the Commission sought to define and specify common types of political activity that are permitted to a federal employee under the Hatch Act:

> (a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—
>
> (1) Register and vote in any election;
>
> (2) Express his opinion as an individual privately and publicly on political subjects and candidates;

[5] The 1939 and 1966 editions of the Commission's Political Activity Pamphlet are reproduced in the Appendix in this Court (App. 89–116; App. 12–37). The 1942 and 1944 editions are printed in the Appendix to the Commission's *Political Activity Reporter*, beginning on pages 24 and 51, respectively. Ten sets of the *Poltical Activity Reporter*, which is a part of the record in this case, have been lodged with the Clerk.

(3) Display a political picture, sticker, badge, or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fundraising function, or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or

class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

In Section 733.122, the Commission defined the major areas of prohibited political management and campaigning:

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

As another aid to understanding the law, the Commission, in 1971, published a three volume work entitled *Political Activity Reporter,* which reproduces the 828 decisions rendered subsequent to enactment of the Hatch Act in adjudication of political activity cases. In addition, the *Reporter* contains historical material and a topical index and digest. The *Political Activity Reporter,* along with cumulative supplements, has been provided to federal agencies, federal courts, State law libraries, accredited law schools, State Attorneys General, United States Attorneys, the Democratic and Republican Party national headquarters, merit system councils, and to individual attorneys upon request. Additionally, the General Counsel's Office contains an Information Unit which is available to give "Hatch Act" briefings and which answers written and telephone inquires concerning the application of the Hatch Act. See App. 54–56.

A comparison of the current regulations and publications of the Commission on the interpretation of the restriction against partisan political management and political campaigning with the materials sub-

mitted by Senator Hatch to the Congress in 1940, describing the nature of the prohibition at that time, demonstrates a long standing and consistent interpretation. While it has made certain minor changes from the 1939 interpretation of the political management and campaigning restriction, the Commission has, in accordance with the congressional mandate in Section 15, administered the restriction in accordance with the basic outlines of its interpretation at the time of enactment of the Hatch Act.[6] The Commission's approach to political management and campaigning cases since the Hatch Act was described in the affidavit of its general counsel submitted in the court below (App. 56):

> In the light of this recognition in the legislative history that Form 1236[7] was the effective equivalent, for the factual situations it covered, of the pre-1940 determinations of the Commission, the Commission made extensive use of Form 1236 in its earlier decisions under the Hatch Act. Until the late 1940's, Form 1236 was also used extensively in the formulation of advisory opinions released by the Office of the General Counsel. As time passed, however,

[6] Changes from the 1939 interpretation, presumably designed primarily to accommodate the interpretation to those portions of the Hatch Act permitting public expression of opinion on political subjects and candidates and permitting non-partisan political activity, include elimination of the prohibitions against discussion of liquor questions, betting or wagering on elections, and participating in a political parade as the member of a musical organization or band (App. 99). In addition, the prohibition regarding publication of letters or articles in newspapers has been significantly modified, in part to conform with the decision in *Wilson* v. *United States Civil Service Commission*, *supra*. (Compare App. 99 with App. 25.)

[7] At the time the Hatch Act was enacted, the Commission's political activity pamphlet was designated "Form 1236."

both the Commission and the General Counsel made more and more use of decisions and opinions issued under the Hatch Act, and placed less and less reliance on Form 1236 as the body of post-Hatch Act precedent became enlarged.

The end result is that the Commission and the Office of the General Counsel today rely almost entirely on post-Hatch Act precedents, precedents which are based ultimately on the substantive content of Form 1236 and the Commission's pre-1940 determinations. The Office of the General Counsel has consistently endeavored to place its operations within the scope of both specific court decisions (e.g., *Wilson* v. *United States Civil Service Commission,* 136 F. Supp. 104, D.D.C. 1955), and discernible trends in judicial decisions generally. We certainly are aware of the great advances in the areas of individual liberties and due process that have taken place since 1940, and we attempt to administer the Hatch Act in the context of currently accepted constitutional doctrine and other legal doctrines. Should such doctrine collide with a strict interpretation of the Act, the Rule, or past administrative decisions, it is our policy that the current doctrines by which we are bound will prevail.

C. POST-HATCH ACT LEGISLATIVE ACTIVITIES

In 1966, nineteen years after the *Mitchell* and *Oklahoma* decisions, Congress decided that the Hatch Act's restrictions on partisan political activity by public employees needed review.[8] It established the Commis-

[8] In the interim, Congress had made a few minor changes in the Act, primarily involving the minimum sanction to be imposed for political activity violations (see note 2, *supra*, p. 19), but it was apparently generally satisfied with the operation of the Act.

sion on Political Activity of Government Personnel, a bipartisan group composed of members from the Congress, the executive branch of government, and private life. 80 Stat. 868.

Upon completion of its task, the Congressional Commission recommended liberalization of the political activity restrictions, and bills, identical to or with minor variances from the recommended bill of the Congressional Commission, have been introduced in each Congress since 1968. *E.g.*, H.R. 2372, 91st Cong., 1st Sess.; S. 2032, 92d Cong., 1st Sess. Other bills have been introduced that do not follow the Congressional Commission's recommendations, but which would substantially revise the Hatch Act. *E.g.*, H.R. 19214, 91st Cong., 2d Sess.; S. 3372, 92d Cong., 2d Sess. Most of these bills died without further action being taken by Congress. Hearings were held by the Senate Committee on Post Office and Civil Service in April 1972 on bills introduced by Senators McGee[9] and Moss[10], but no legislative action resulted. A number of bills have been introduced in the current Congress proposing new approaches to political activity restraints.[11] The Civil Service Commission is itself currently preparing proposed legislation on the subject for submission to Congress.

To date, however, Congress has not only declined to narrow the political activity provisions, but has actually extended their application to persons not previously covered. In the Economic Opportunity Act of 1964, as amended, the political activity restrictions were extended to certain employees of private cor-

[9] S. 3374, 92d Cong., 2d Sess.
[10] S. 3417, 92d Cong., 2d Sess.
[11] H.R. 668, S. 350, S. 235, 93d Cong., 1st Sess.

porations (42 U.S.C. 2943); in the Postal Reorganization Act, the provisions were specifically made applicable to the Postal Service (39 U.S.C. 410); and in the Emergency Employment Act of 1971, the provisions were extended to personnel employed in the administration of the programs established thereunder (42 U.S.C. (Supp. 1) 4881(h)).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,
Appellants,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

Brief for the Coalition of American Public Employees (Consisting of the National Education Association, the American Federation of State, County, and Municipal Employees, AFL-CIO, and the International Association of Fire Fighters, AFL-CIO), the American Federation of Government Employees, AFL-CIO, and the American Postal Workers Union, AFL-CIO, as Amici Curiae

The parties have consented to the filing of this brief, which supports the position of Appellees that the Court should affirm the decision below of a three-judge district court, reported as *National Ass'n of Letter Car.* v. *United States C. S. Com'n,* 346 F. Supp. 578 (D. D.C., 1972).

INTEREST OF AMICI CURIAE

The Coalition of American Public Employees is composed of three public employee organizations: the National Education Association, the American Fed-

eration of State, County, and Municipal Employees, AFL-CIO, and the International Association of Fire Fighters, AFL-CIO. Those organizations have a combined membership of some 1,940,000 (NEA, 1,200,000; AFSCME, 600,000; IAFF, 150,000), almost all of whom are employees of a State or local government or governmental body, and function as the bargaining representatives of approximately 3,000,000 such employees. The Coalition was organized in March 1971 to bring to bear upon the common concerns of government workers the collective power of organizations representing diverse employee groups in the public sector.

The American Federation of Government Employees, AFL-CIO ("AFGE"), is an unincorporated association and labor union composed of approximately 300,000 members, who are civilian employees of the Federal or District of Columbia governments. AFGE is the largest labor organization of non-postal federal employees, and is the exclusive representative of approximately 650,000 civilian government employees, including so-called blue collar, white collar, and professional classes of employees, dispersed through every major department and agency of the Federal Government. In that capacity, AFGE deals with management of the concerned agencies on grievances, personnel policies and other matters affecting working conditions of the employees it represents. It is charged with representing the interests of all those employees in a non-discriminatory manner and without regard to union membership by Sections 10(e) and 19(b)(1) and (5), Executive Order 11491, as amended, 36 Fed. Reg. 17319 (1971), and by Items b. (1) and (7), Chapter 25A, of the District of Columbia Personnel Manual. This representation covers disciplinary actions brought pursuant to the Hatch Act against employees, which are matters clearly affecting their working conditions.

The American Postal Workers Union, AFL-CIO ("APWU"), is composed of four crafts: the clerks, motor vehicle, maintenance, and special delivery messengers, as well as the former National Postal Union. It is a national union representing approximately 350,000 individuals who are located in postal installations throughout the United States. APWU bargains collectively for its members under the Postal Reorganization Act of 1970 (Title 39 of the U.S. Code). Under the provisions of Section 410 of that Act (39 U.S.C. § 410), the members of the United States Postal Service which APWU represents are specifically included within the coverage of the Hatch Act.

The special interests of the Coalition of American Public Employees and its constituent organizations, AFGE and APWU in this litigation are obvious. They represent many of the government employees whose political rights presently are circumscribed by the Hatch Act or comparable State or local laws. Those employees pay taxes, are subject to conscription for military service, and generally are subject to Federal, State and local laws on the same basis as other citizens without any exemption by reason of their status as government employees. The individual who is elected to a particular public office, the policies that a government adopts and the manner in which those policies are carried out, generally are as important to government employees in their capacity as citizens as they are to other citizens. These *amici* have a strong interest, therefore, in urging this Court to assure that government employees, such as those they represent, have the same constitutional rights as other citizens to participate actively in political campaigns and related political activities, restricted only in the narrowest way necessitated by compelling governmental interests.

These *amici* also have a broader interest in this litigation, one that we think is or should be shared by all citizens. As the Report of the Commission on Political Activity of Government Personnel (1967) observed, Vol. I, at 3, "in our democratic society it is important to encourage the participation of as many citizens as possible in the political processes which shape our government." All of us are the poorer when the range of potential candidates or of those eligible to participate in debate upon political issues is narrowed. When a Federal government employee is prohibited from being a candidate for the council of his city, for example, that city's voters generally also are deprived of the opportunity to have him as their candidate and to cast their votes in his behalf. A prohibition against driving voters to the polls affects those who would be driven as well as the government employee prohibited from doing the driving. If a government employee is prohibited from taking part in a political debate or making a political endorsement, those who might be persuaded by his arguments or by respect for his views also are harmed. In short, this litigation concerns not only the constitutional right of government employees to take an active part in the political process, but also the constitutional right of voters generally to select such persons as their candidates and to have the benefit of the speeches, endorsements or other political activities of such persons in deciding how to vote or what position to adopt in regard to political issues.

For these reasons, these *amici* believe that a decision in this case overruling *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and affirming the decision below, is in the best interests not only of the government employees subject to the Hatch Act or to comparable State and local legislation, but also of the citizenry generally and the well being of American

political institutions. We are hopeful that this *amicus* brief will assist the Court in reaching that decision by applying those doctrines protecting First Amendment rights, including the right to participate actively in political processes, which the Court has firmly established in many other cases since *Mitchell* was decided.

STATEMENT OF THE CASE

In 1971, there were about 2,820,000 civilian employees in the executive branch of the Federal government, some 2,830,000 State government employees and some 7,610,000 local government employees.[1] This case and *Broadrick, et al.* v. *The State of Oklahoma, et al.*, No. 71-1639, afford the Court an opportunity to remove the cloud that has been cast by *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), upon the constitutional right of that large and important segment of the population to participate actively in the political life of the country. While the Court when *Mitchell* was decided did not "know whether the number of federal employees will expand or contract" (*id.*, at 102), such employees now have become, and it seems relatively certain that they will continue to be, a large segment of the population. As *Mancuso* v. *Taft*, 341 F. Supp. 574, 576-577 (D.R.I., 1972), observed, after noting that Federal, State and local government employees comprised about 15% of the country's total working force in 1968, "[r]estrictions on the freedom of political expression of such a large portion of the population is a matter of much concern."

Specifically involved in this case is the constitutionality of a sentence in the Hatch Act (53 Stat. 1147, as amended), as codified and reenacted as a part of Title 5 of the United States Code (80 Stat. 403-407, 525-526),

[1] Statistical Abstract of the United States (1972 Ed.), at 399-403, 430-431.

which provides that a covered government employee may not "take an active part in political management or in political campaigns." §§ 1502(a)(3), 7324(a)(2). That phrase is defined to mean "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." §§ 1501(5), 7324(a). An exclusion from the prohibition is provided for "political activity in connection with" elections in which "none of the candidates" represents or seeks to represent a party that participated in the immediately preceding presidential election or as to questions (such as constitutional amendments, referendums and approval of municipal ordinances) "not specifically identified with a National or State political party." §§ 1503, 7326. The Act also provides that a covered employee "retains the right to vote as he chooses and to express his opinions on political subjects and candidates." §§ 1502(b), 7324(b).

The Act's prohibition against taking "an active part in political management or in political campaigns" applies to each "employee in an Executive agency" of the Federal government, except those in the Office of the President, the heads and assistant heads of departments, and some (but not all) employees appointed by the President with the advice and consent of the Senate. § 7324(a), (d). It does not apply, however, "to an employee of The Alaska Railroad who resides in a municipality on the line of the railroad in respect to political activities involving that municipality." § 7327(a). It also does not apply, insofar as the Civil Service Commission ("CSC") may by regulation prescribe, to participation by Federal employees in "poli-

tical management and political campaigns involving the municipality or other political subdivision in which they reside," if such municipality or other political subdivision "is in Maryland or Virginia and in the immediate vicinity of the District of Columbia" or is one "in which the majority of voters are employed by the Government of the United States." § 7327(b). Current CSC regulations list some 41 municipalities or political subdivisions in Maryland, 11 in Virginia and 13 located elsewhere as being subject to this exception, and limit the exception to participation "as an independent candidate or on behalf of, or in opposition to, an independent candidate" for office in one of the municipalities or political subdivisions so listed. 5 C.F.R. § 733.124(b) and (c).

The Act's prohibition against taking "an active part in political management or in political campaigns" also applies to each "individual employed by the government of the District of Columbia," except the D.C. Commissioners, the Recorder of Deeds, and those individuals "employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization." § 7324(a), (c) and (d). As is true of Federal employees, the restriction upon the political activities of covered D.C. employees residing in the Maryland or Virginia suburbs is inapplicable, to the extent that the CSC may prescribe, to political management and political campaigns for office in those suburban municipalities or political subdivisions. § 7327(b).

In addition, the Act's prohibition against taking "an active part in political management or in political cam-

paigns" applies to each "State or local officer or employee" whose "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency," §§ 1501(4), 1502(a), except those who exercise "no function in connection with" such activities, or who are employed "by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization," and governors and lieutenant governors, mayors, elected heads of State and municipal executive departments, and other individuals holding elective office, §§ 1501(4), 1502(c).

A Federal or D.C. employee found to have violated the Act must be permanently removed from his position as an employee, unless the CSC, by unanimous vote, prescribes a suspension from office without pay for 30 days or more. § 7325. If a State or local employee violates the Act, and the CSC determines that the violation warrants his removal from office, the federal grant or loan to the agency involved will be reduced in an amount equivalent to double the employee's annual salary if such removal is not accomplished within 30 days and maintained for at least 18 months. § 1506(a). While the CSC is charged with enforcement of the Act as to covered State and local employees and Federal employees in the "competitive" service, as to Federal employees "excepted" from the competitive service, such as attorneys, the responsibility for enforcement rests with the head of the employing department or agency. 5 C.F.R. § 733.201.

The court below noted that the Act's "[p]rohibitions are worded in generalities that lack precision" so that "[n]o one can read the Act and ascertain what it prohibits" (346 F. Supp., at 582), that the Act "incorporates by reference over 3,000 rulings made by the [Civil Service] Commission between 1886 and 1940" which "have a sweep and indefiniteness that no one would even attempt in these days to defend if analyzed against the strictures of the First Amendment" (*id.*, at 580), that "the administrative actions" of the CSC since 1940, "even if unqualifiedly accepted as the administrative gloss on the Act, still place any federal employee at hazard if he ventures to speak on a political matter since he will not know when his words or acts relating to political subjects will offend" (*id.*, at 582-583)," that "even those most intimately concerned with its enforcement are in doubt and have sought legislative clarification" (*id.*, at 582), and that "[u]ncertainties abound and they will produce excessive caution and stifle words and acts not explicitly prohibited" (*id.*, at 583).

The Commission on Political Activity of Government Personnel, consisting of 12 distinguished members under the chairmanship of Arthur S. Flemming and established by the Congress in 1966 to "make a full and complete investigation and study of the Federal laws which limit or discourage the participation of Federal and State officers and employees in political activity" (80 Stat. 868), reached similar conclusions after investigating the actual understandings of employees regarding what is and what is not prohibited by the Act. Report, Vol. I, at 19-22.

> "Faced with compelling evidence that the existing law unduly confuses and restricts more than 4.5

> million Federal, State, and local public employees, this Commission proposes a new approach. It recommends that Congress eliminate the confusing array of do's and don'ts by clearly defining permitted activities and prohibitions in the statute. The prohibitions would be only those that Congress finds necessary to protect employees against actions that would threaten the integrity, efficiency, and impartiality of the public service." *Id.*, at 21.

"It was the unanimous view of the Commission members . . . that these limits should be clearly and specifically expressed, and that beyond those limits political participation should be permitted as fully as for all other citizens." *Id.*, at 3.

While the full extent of the Act's prohibition against taking "an active part in political management or in political campaigns" is impossible to ascertain, there can be no doubt that the Act restricts the freedom of covered employees to be (or to seek nomination as) candidates for most Federal, State and local elective offices, from supporting or opposing others as candidates for such offices through such activities as fund raising, soliciting votes, public endorsements and public speeches, and from engaging in a wide variety of political party activities. See the current CSC regulations which list such activities as being prohibited by the Act, while noting that the Act's prohibitions are "not limited to" the listed activities. 5 C.F.R. §§ 151.122, 733.122. These restrictions, whatever their extent, apply to the off-duty activities of all covered employees as well as to their on-the-job activities without any distinction.

In general, moreover, the Act's restrictions upon the freedom of government employees to engage in poli-

tical activities, whatever the extent of those restrictions may be, apply without regard either to the nature of the political campaign or to the nature of the employee's job. Whether the political campaign is for local dogcatcher or President of the United States, whether the employee performs janitorial work or fills an important policy position, and whether he deals with the public or is totally obscure, the identical restrictions apply. This generality is subject to exceptions, but those exceptions appear to reflect expediency or happenstance rather than some unifying principle or constancy of purpose.

Thus, all teachers and other educational or research employees of the District of Columbia and of State and local governments are excepted from the Act's prohibitions, but not those employed by the Federal Government and no other non-administrative employees are excepted generally. Employees of The Alaska Railroad are excepted insofar as municipal political activities are concerned, but not otherwise and no other category of employees has an absolute exemption in regard to municipal political activities. The CSC may by regulation dilute or abolish the restrictions against political activities of Federal and D.C. employees residing in the Maryland or Virginia suburbs of the District of Columbia or in a locality in which such employees comprise a majority of the voters, in regard to municipal and other local political campaigns, but not as to State or Federal political campaigns. No such authority is given to the CSC with respect to Federal and D.C. employees residing elsewhere (including the District of Columbia itself) or with respect to any State or local employees. While the heads and assistant heads of Federal departments and some (but not

all) Federal employees appointed by the President with the consent of the Senate are excepted (including the members of the CSC), there is no general exception for Federal employees holding high-level policy-making or non-civil service jobs, the heads of State and local executive departments are not exempted unless those positions are elective, and the Commissioner (or Mayor) and Recorder of Deeds are the only District of Columbia officials exempted.

The Commission on Political Activity of Government Personnel "believe[d] that all the inequalities in the present coverage and enforcement [of the Act] are undesirable." Report, Vol. I, at 25. It particularly criticized the "distinction[s] based on geographic location" of covered employees, as employees living in the favored areas "have a substantial privilege that is denied vast numbers of employees living elsewhere" solely because of the place where they reside. *Id.*, at 24. The Commission also concluded that the Act's distinction between nonpartisan and partisan activities "is Unworkable and Unrealistic." *Id.*, at 22. "A person may be partisan for a person, an issue, or a candidate without having any feeling of identification with one political party or another. A majority of this Commission's members feel there is no such thing as a nonpartisan campaign or a nonpartisan election." *Id.*, at 23. Thus, the Commission recommended, among other things, that the "distinction between local political offices which can be campaigned for and held by Federal employees, and those which cannot, should be based on the nature of the office itself, without reference to a 'partisan' or 'nonpartisan' distinction or to the geographic area where the employee lives." *Id.*, at 4.

We have noted that the Hatch Act itself applies to many State and local, as well as to Federal and D.C., government employees. In addition, many States and local governmental units also have laws restricting the political activities of some of their employees. This is illustrated by the *Broadrick* case which involves the constitutionality of an Oklahoma statute providing that "[n]o employee in the classified service . . . shall, directly or indirectly, . . . in any manner be concerned in soliciting or receiving an assessment, subscription or contribution for any political organization, candidacy or other political purpose," or "be a member of any national, state or local committee of a political party," or be "an officer or member of a committee of a partisan political club," or be "a candidate for nomination or election to any paid public office," or "take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." 74 Okla. Stat. Ann. § 818 (6th and 7th unnumbered paragraphs). Employees found to have violated the Act must be dismissed from employment, 74 Okla. Stat. Ann. § 818 (8th unnumbered paragraph), and those who "willfully violate" the Act are guilty of a misdemeanor, and may be fined not less than $50.00 nor more than $1,000.00, or imprisoned for not more than six months, or both. 74 Okla. Stat. Ann. § 819.

The Oklahoma Act's prohibition against taking "part in the management or affairs of any political party or in any political campaign" obviously shares much of the vagueness and overbreadth of the Hatch Act's prohibition against taking "an active part in political management or in political campaigns," and involves the additional difficulty of ascertaining what

constitutes an "affair" of a political party. Moreover the Oklahoma statute appears to go even further than the Hatch Act in restricting the political activity of covered employees since any "part," however minute, that they may take in "the management or affairs of any political party or in any political campaign" seems to be prohibited except voting and private expressions of opinion.[2] Thus, all public expressions of political opinions appear to be prohibited (what makes an expression public rather than private is not defined), and even mere membership in a political party may be banned. While Oklahoma's employees "in the classified service" thus are virtually incapacitated politically, some 22 categories of its employees are excluded from the "classified service" and are not subject to those restrictions. 74 Okla. Stat. Ann. §§ 803, 803.1, 803.2, 822. Here, too, there does not appear to be any unifying principle based upon either the nature or level of the position held to explain who is restricted and who is not, and the only apparent distinction based on the nature or level of the political campaigns involved is that candidacy for public office is prohibited only if the officeholder is "paid."

In its 1967 Report (Vol. II, Part IV), the Commission on Political Activity of Government Personnel compiled the then-existing State laws restricting the political activity of State employees, and classified the laws of eight States (including Oklahoma) as being more restrictive than the Hatch Act, those of nine States as being similar to the Hatch Act and the laws of 33 States as being less restrictive than the Hatch Act.

[2] The Government notes (Brief, at 18) that the Congress, in the Hatch Act, eliminated the word "privately" in authorizing expressions of political opinions.

(including 10 that imposed little or no restrictions). We are not aware of any compilation of local ordinances or regulations restricting the political activities of some or all of the employees of a particular county, municipality, local agency or other local political subdivision or body, but they appear to be widespread.[3] Many of these State and local laws and policies, like the Hatch Act and the Oklahoma Act, contain vague, broadsweeping prohibitions, provide seemingly inconsistent exceptions as to the employees covered, and, in limiting the First Amendment rights of covered employees, make no apparent effort to tailor the restrictions so as to do no more than is necessary to meet some compelling need.

This network of broad, vaguely-worded legislation has flourished under the shelter of the "rational basis" standard applied in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), to uphold the constitutionality of the Hatch Act's restrictions on the First Amendment rights of federal employees.[4]

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[3] See, *e.g.*, *Lay* v. *City of Kingsport, Tennessee*, 454 F.2d 345 (6th Cir., 1972); *Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir. 1971); *Mancuso* v. *Taft*, 341 F. Supp. 574 (D.R.I., 1972); *Gray* v. *City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio, 1971); *Montgomery* v. *White*, 320 F. Supp. 303 (E.D. Tex., 1969); *Fort* v. *Civil Service Com'n of County of Alameda*, 38 Cal. R. 625, 392 P.2d 385 (1964); *Kinnear* v. *City and County of San Francisco*, 38 Cal. R. 631, 392 P.2d (1964); *City of Miami* v. *Sterbenz*, Fla., 203 So.2d 4 (1967); *De Stefano* v. *Wilson*, 96 N.J. Super. 592, 233 A.2d 682 (1967); *Ivancie* v. *Thorton*, 250 Or. 550, 443 P.2d 612 (1968); *Willis* v. *City of Fort Worth*, Tex., 380 S.W.2d 814 (1964); *Salt Lake City Fire. Fight. Loc. 1645* v. *Salt Lake City*, 22 Utah 2d 115, 449 P.2d 239 (1969).

[4] In a companion decision which merely adopted by reference the reasoning in *Mitchell* on the First Amendment issue, this Court also upheld the constitutionality of the Act's restrictions on States and local employees. *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 142 (1947).

The court below concluded, and we intend to demonstrate, that *Mitchell* "is inconsistent with subsequent decisions delineating First Amendment freedoms" which have "undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based," so as to "place *Mitchell* among other decisions outmoded by passage of time." 346 F. Supp., at 585. This also has been recognized by some other lower Federal and State courts that have invalidated State or local laws because of their overbroad encroachments upon the First Amendment rights of government employees.[5] Other such courts, however, have treated the *Mitchell* decision as being virtually conclusive on the constitutional issue, both in Hatch Act cases[6] and in regard to State and local statutes restricting

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[5] *Hobbs* v. *Thompson*, 448 F.2d 456, 471-475 (5th Cir., 1971); *Mancuso* v. *Taft*, 341 F. Supp. 574, 575-583 (D. R.I., 1972); *Fort* v. *Civil Service Com'n of County of Alameda*, 38 Cal. R. 625, 392 P.2d 385, 388-389 (1964); *Minielly* v. *State*, 242 Or. 490, 411 P.2d 69, 71-78 (1969). Cf. *Montgomery* v. *White*, 320 F. Supp. 303, 304 (E.D. Tex., 1969); *Huerta* v. *Flood*, 103 Ariz. 608, 477 P.2d 866 (1969); *Bagley* v. *Washington Township Hospital District*, 55 Cal. R. 401, 421 P.2d 409 (1966); *Kinnear* v. *City and County of San Francisco*, 38 Cal. R. 631, 392 P.2d 391 (1964); *City of Miami* v. *Sterbenz*, Fla., 203 So.2d 4 (1967); *De Stefano* v. *Wilson*, 96 N.J. Super. 592, 233 A.2d 682 (1967).

[6] *Kearney* v. *Macy*, 409 F.2d 847, 848 (9th Cir., 1969); *Northern Va. Reg. Pk. Auth.* v. *United States Civ. Serv. Com.* 437 F.2d 1346, 1348-1351 (4th Cir., 1971); *Palmer* v. *United States Civil Service Commission*, 297 F.2d 450, 452-455 (7th Cir., 1962); *Fishkin* v. *United States Civil Service Commission*, 309 F. Supp. 40, 43-46 (N.D. Cal., 1969), app. dis. as untimely, 396 U.S. 278 (1970); *Democratic St. Cent. Com. for Montgomery County Md.* v. *Andolshek*, 249 F. Supp. 1009, 1015-1018 (D. Md., 1966); *Gray* v. *Macy*, 239 F. Supp. 658, 660 (D. Ore., 1965), rev'd on other grounds, 358 F.2d 742 (9th Cir., 1966); *Engelhardt* v. *United States Civil Service Commission*, 197 F. Supp. 806, 811-812 (M.D. Ala., 1961), aff'd *per curiam* on basis of opinion below, 304 F.2d 882 (5th Cir., 1962).

political activities of government employees,[7] unless and until overruled expressly by this Court. That view was pithily expressed by the statement of the court below in *Broadrick* that an "inferior court can never 'erode' a decision of the United States Supreme Court."[8]

Therefore, the very existence of the *Mitchell* decision has exerted and, unless overruled by this Court, will continue to exert, a chilling effect upon the exercise by millions of government employees of their First Amendment rights to participate actively in the political processes that are central to our system of government. The time has come for the Court to make entirely clear that the fundamental right of government employees to participate in the political process, like that of other citizens, cannot be restricted except insofar as is necessary to promote a compelling state interest, and then only to the least drastic extent possible and by clear and precise language.

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[7] *Lay* v. *City of Kingsport, Tennessee*, 454 F.2d 345, 347 (6th Cir., 1972); *Stack* v. *Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla., 1970); *Wisconsin State Emp. Ass'n* v. *Wisconsin Nat. Resources Bd.*, 298 F. Supp. 339, 350 (W.D. Wis., 1969); *Swinney* v. *Untreiner*, Case, No. 42,594 (Fla. Sup. Ct.; Opinion filed January 22, 1973); *Salt Lake City Fire Fight. Loc. 1645* v. *Salt Lake City*, 22 Utah 2d 115, 449 P.2d 239, 240 (1969). Cf., *Gray* v. *City of Toledo*, 323 F. Supp. 1281, 1284-1286 (N.D. Ohio, 1971); *Deeb* v. *Adams*, 315 F. Supp. 1299 (N.D. Fla., 1970); *Johnson* v. *State Civil Service Department*, 280 Minn. 61, 157 N.W.2d 747, 751 (1968); *Willis* v. *City of Fort Worth*, Tex., 380 S.W.2d 814 (1964).

[8] *Broadrick* v. *State of Oklahoma ex rel. Okl. Person. Bd.*, 338 F. Supp. 711, 716 (W.D. Okla., 1972).

SUMMARY OF ARGUMENT

In 1947, this Court rejected a contention that the Hatch Act violated the First Amendment. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). Although conceding that the Act restricted political speech and associations of government employees, a 4-3 majority of the Court concluded that the Act should be upheld because it has a rational relationship to a proper governmental purpose, and perhaps also because government employment is a privilege rather than a right.

Since 1947, however, this Court in numerous decisions has repudiated the notion that encroachments upon the First Amendment rights of government employees can be justified on the ground that employment is a privilege, not a right. Furthermore, this Court has firmly established that the "rational basis" test applied in *Mitchell* is not applicable when First Amendment freedoms and other fundamental constitutional rights are involved. Rather, legislation restricting freedom of speech and association, and other fundamental rights, must be necessary to further a compelling governmental interest. The Court has emphasized that the application of this test, and the close and exacting examination of legislation which it requires, is particularly important when—as is true under the Hatch Act—participation in political activities is restricted. It "can hardly be doubted that the constitutional guarantee has its fullest and most urgent application to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971). Hence, under present-day constitutional doctrines such legislation cannot be overbroad, even if otherwise justified. It must be limited to the least

drastic available means of achieving a compelling governmental interest.

This Court, therefore, should overrule *Mitchell* because, as the court below concluded, "it is inconsistent with subsequent decisions delineating First Amendment freedoms," which have "undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based," and "place *Mitchell* among other decisions outmoded by passage of time." 346 F. Supp., at 583. The Court should do so even if it holds, as we think it should, that the Hatch Act's prohibition against taking "an active part in political management or in political campaigns" is void for vagueness—an issue not reached in *Mitchell*. Otherwise, that decision and its endorsement of the "rational basis" approach will continue to have a chilling effect upon the exercise by government employees of First Amendment speech and association, as it has in the past, by inhibiting inferior courts and legislative bodies from subjecting existing or proposed legislation restricting the political activities of government employees to the rigorous scrutiny required by modern constitutional doctrines.

The Hatch Act's prohibition against covered government employees taking "an active part in political management or in political campaigns" cannot pass muster if subjected to such scrutiny. The Act is shot through with exceptions and exemptions that in themselves undercut either the allegedly compelling nature of the Act's purposes asserted by the Government, or the existence of such purposes. Moreover, the Act's prohibition plainly is overbroad. The Government has not even attempted to undertake its burden of demonstrating that less drastic means of achieving those as-

serted purposes are not available, and it obviously is not impossible to draft legislation which, in narrowly defined and precise terms, prohibits government employees from neglecting their official duties so as to engage in political activities and from utilizing their government positions either to obtain or to afford political favoritism or to advance personal political interests. Indeed, some such legislation already exists.

The overbreadth of the Hatch Act's prohibition is emphasized by the fact that it applies equally to political activities engaged in by a covered employee in his capacity as an employee and to those engaged in by him in his capacity as a private citizen, as while off duty, and does not otherwise depend upon whether the political activities in question affect the employee's performance of his duties as a government servant or are related to those duties. In *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), this Court made clear that a government employee is to be considered as a member of the general public, and is no more subject to governmental restrictions than other citizens, insofar as political activities unrelated to the performance of his duties as a government employee are concerned. The overbreadth of the Act's prohibition is further emphasized by the fact that, with some irrational exceptions, no distinction is made in regard to the nature of the political campaign or the political office involved. It may apply without regard to whether the political campaign is for the most insignificant local office or the Presidency of the United States, or as to whether the employee involved fills a lowly industrial-type job or an important policy-making position. And, it may apply even though the political campaign or election involved is one in which the government employee has a stake which does not differ from that of other citizens.

The overbreadth of the prohibition against taking "an active part in political management or in political campaigns" cannot be avoided by a narrowing judicial construction without rewriting the statute. Hence, that prohibition is invalid on its face and in its entirety.

The Hatch Act's prohibition against taking "an active part in political management or in political campaigns" also is overly vague, as well as being overbroad, as the court below concluded. Its terms are "so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application . . . ." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926). While we do not undertake to discuss this issue in detail, in view of the extensive discussion in the opinion below and in the Brief for Appellees, we do undertake to demonstrate that the arguments made by the Government in its Brief, when closely analyzed, compound, rather than disperse, the uncertainties inherent in the broad, indefinite statutory language, and thus confirm the Act's unconstitutional vagueness.

ARGUMENT

In *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), a 4-3 majority of this Court held that the Hatch Act's prohibition against covered government employees taking "an active part in political management or in political campaigns" did not violate the First Amendment to the Constitution.[9] While conced-

[9] While the *Mitchell* case directly involved the application of that prohibition to federal employees, the companion *Oklahoma* decision relied upon *Mitchell's* reasoning in upholding its application to State and local government employees. See fn. 4, p. 15, *supra*. Our demonstration herein that *Mitchell* is no longer good law also applies to that case.

ing that the Act results in "a measure of interference . . . with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments" (*id.*, at 95),[10] and accepting the "argument that political neutrality is not indispensable to a merit system for federal employees" (*id.*, at 100), the majority concluded that for "regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service" (*id.*, at 101) so that the "determination of the extent to which political activity shall be regulated lies primarily with Congress" and the "Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power" (*id.*, at 102). Mr. Justice Black, in dissent, urged unsuccessfully that "laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public" (*id.*, at 110). Mr. Justice Douglas agreed (*id.*, at 124, 126), and urged particularly the failure of the Act to make any distinc-

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[10] The majority also noted that "if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment," but pointed out that the "objections under the Amendments are basically the same" (330 U.S., at 95). Of course, it is also well established that the First Amendment is applicable to State and local governments through the Fourteenth Amendment. *E.g.*, *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963). Hence, this case and the *Broadrick* case arising out of an Oklahoma statute involve similar issues insofar as the First Amendment is concerned.

tion between "industrial" type employees and those engaged in administrative work.

Hence, as the court below and some other lower Federal and State courts have recognized (see p. 16, *supra* and the cases cited in fn. 5 thereto), the majority of this Court in *Mitchell* applied the "rational basis" test in upholding the power of the Congress through the Hatch Act to restrict the First Amendment rights of government employees. The majority also may have relied to some extent upon the notion that government employment is a "privilege" which may be conditioned upon the relinquishment of constitutional rights (see 330 U.S., at 99, fn. 34). But as those courts also recognized and as we expect to demonstrate, in the 25 years since *Mitchell* was decided this Court in a long series of cases has repudiated the "privilege" doctrine and has firmly established that legislation encroaching upon First Amendment and other constitutional rights is not measured by the "rational basis" test, but rather must be closely scrutinized by the courts to determine whether such encroachments are necessary to serve a compelling state interest. To survive that test, the legislation must not only be justified by a compelling interest, but also must not be overbroad and must be limited to the least drastic means necessary to protect that interest. In addition, more rigorous standards of clarity are required. We also expect to demonstrate that the Hatch Act's sweeping prohibition against taking "an active part in political management and in political campaigns" cannot pass muster under those modern constitutional doctrines, and we think that is also true of comparable State and local laws such as the Oklahoma statute before the Court in *Broadrick*.

A. The Mitchell Decision Should Be Expressly Overruled.

1. *The Right-Privilege Distinction Has Been Repudiated.* We do not think it necessary to expend much time in demonstrating that the Court has repudiated any notion that the deprivation of the First Amendment rights of government employees can be justified on the ground that government employment is a "privilege" rather than a "right." The Government does not appear to place any reliance upon that discredited doctrine, and in *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972), this Court recently summarized the now established view regarding this matter, citing many of its relevant decisions, as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall, supra,* unemployment benefits, *Sherbert* v. *Verner,* 374 U.S. 398, 404-405, and welfare payments, *Shapiro* v. *Thompson,* 394 U.S. 618, 627 n. 6; *Graham* v. *Richardson,* 403 U.S. 365, 374. But, most often,

we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100; *Wieman* v. *Updegraff,* 344 U.S. 183, 192; *Shelton* v. *Tucker,* 364 U.S 479, 485-486; *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894; *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 288; *Baggett* v. *Bullitt,* 377 U.S. 360; *Elfbrandt* v. *Russell,* 384 U.S. 11, 17; *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606; *Whitehill* v. *Elkins,* 389 U.S. 54; *United States* v. *Robel,* 389 U.S. 258; *Pickering* v. *Board of Education,* 391 U.S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education, supra,* with *Shelton* v. *Tucker, supra.*"

See, also, *Board of Regents* v. *Roth,* 408 U.S. 564, 571 n. 9 (1972).

In short, the notion that a government may deny First Amendment or other constitutional rights to its employees because government employment is a "privilege" has been completely exploded in recent years. Indeed, as the citation of *Mitchell* in the above quotation indicates, there is language in the majority opinion in that case inconsistent with that notion, even though at another point the *Mitchell* majority seemed to place some reliance upon it. Thus, in its seminal opinion (on this point) in *Wieman* v. *Updegraff,* 344 U.S. 183, 191-192 (1952), the Court pointed to the assertion in *Mitchell* "that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' 330 U.S., at 100."

2. *The "Rational Basis" Test Has Been Repudiated and the "Compelling Interest" Test Applied When First Amendment Freedoms Are Involved.* We think it equally clear that the decisions of this Court in recent years have established beyond reasonable question that the "rational basis" test does not apply in determining the constitutionality of legislation that encroaches upon First Amendment or other fundamental constitutional rights. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice . . . in this highly sensitive constitutional area . . . ." *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963). So, too, the Court explicitly rejected a contention that "a mere showing of a rational relationship" to "admittedly permissible state objectives" would justify a legislative classification penalizing the exercise by some citizens of "a constitutional right," since "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969).[11] Thus, recent "decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' " *Williams* v. *Rhodes,* 393 U.S. 23, 31 (1968).

The application of these principles, and the "close and exacting examination" of challenged legislation

[11] To the extent that the decisions rest upon the fact that the citizens restricted by State legislation from exercising fundamental constitutional rights have been deprived of the equal protection of the laws, similar requirements are imposed upon the Federal government by the Due Process Clause of the Fifth Amendment. *Shapiro* v. *Thompson, supra* at 641-642.

which they require,[12] are particularly important when—as here—the right of some citizens to participate freely in political affairs is restricted. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. That right was enshrined in the First Amendment of the Bill of Rights." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). And, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971). "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer* v. *Union School District, supra* at 626. "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality" and a "more exacting standard obtains" requiring that the legislation be necessary to further "a compelling state interest . . ." *Id.,* at 628, 633.

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[12] *Kramer* v. *Union School District,* 395 U.S. 621, 626 (1969).

In *Kramer*, the Court applied these principles in striking down a statute imposing property qualifications upon the right to vote. Accord, *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Ciprano* v. *City of Houma*, 395 U.S. 701 (1969). They have been applied in invalidating laws making the right to vote dependent upon the payment of poll taxes, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966), or imposing excessive durational requirements upon eligibility to vote, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). They have been applied to invalidate a law prohibiting electioneering or the soliciting of votes on election day, *Mills* v. *Alabama, supra;* unnecessarily severe restrictions upon the right of independent candidates to be placed on the ballot, *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); the refusal to seat an elected candidate because of his public statements, *Bond* v. *Floyd*, 385 U.S. 116 (1966); and libel laws too broadly restricting public criticism of candidates for public office, *Monitor Patriot Co.* v. *Roy, supra*, as well as of sitting public officials, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

In *Bullock* v. *Carter*, 405 U.S. 134, 142-144 (1972), the Court applied these "compelling interest" principles to a law restricting eligibility to be a candidate in a primary to select a nominee for public office, and pointed out that restrictions on the right of individuals to be a candidate for public office necessarily also restrict voters generally in the selection of the candidates for whom they desire to cast their votes. *Cf. Turner* v. *Fouche*, 396 U.S. 346, 362-364 (1970). And, these principles have been applied to invalidate laws inhibiting the freedom to associate with others for political purposes. *Healy* v. *James*, 408 U.S. 169 (1972); *Bates* v. *Little Rock*, 361 U.S. 516

(1960); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958). The Court has recognized the established nature of these principles in decisions rendered as late as its current term. *Roe* v. *Wade,* — U.S. —, 41 U.S.L.W. 4213, 4226 (1973); *Goosby* v. *Osser,* — U.S. —, 41 U.S.L.W. 4167, 4169 (1973).[13]

As noted in our Statement of the Case (p. 10, *supra*), whatever may be the full extent of the Hatch Act's prohibition, there can be no doubt that the covered government employees are subject to restrictions against becoming candidates for public office, publicly endorsing or speaking in behalf of others who campaign for office, solicitation of votes, and taking an active role in political parties or organizations. In short, they are subjected to restrictions upon participation in the political process that this Court, in many decisions since Mitchell, has held must be demonstrated to be necessary to serve a compelling public interest before the encroachment upon the First Amendment freedoms of speech and association can be justified.[14]

Moreover, any possible basis for a contention that laws restricting the political activities of government employees somehow constitute an exception to the application of the strict "compelling interest" standard, so that *Mitchell's* application of the "rational basis" standard should continue to be recognized as good law, has been destroyed by a number of decisions not yet

[13] We have not attempted, of course, to list all the many cases applying these principles, or all of the situations in which they have been applied, in recent years.

[14] This is also true of the Oklahoma employees subject to the statute of that State at issue in the *Broadrick case.* See pp. 13-14, *supra.*

mentioned. Those decisions have directly applied the "compelling interest" principles discussed above in invalidating a variety of restrictions upon the political activities of government employees. They include laws barring government employment to members of "subversive" organizations, *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), excluding members of the armed services domiciled in a State from eligibility to vote in State elections, *Carrington* v. *Rash,* 380 U.S. 89 (1965), and excluding residents of a "federal enclave" within a State from eligibility to vote in State elections, *Evans* v. *Cornman,* 398 U.S. 419 (1970), and school board action resulting in the dismissal of a teacher for the "exercise of his right to speak on issues of public importance," *Pickering* v. *Board of Education,* 391 U.S. 563, 574 (1968); *cf., Wood* v. *Georgia,* 370 U.S. 375 (1962).

We submit, therefore, that the court below clearly was correct in concluding that *Mitchell* "is inconsistent with subsequent decisions delineating First Amendment freedoms," which have "undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based," and "place *Mitchell* among other decisions outmoded by passage of time." 346 F. Supp., at 585.

3. *Legislation Affecting First Amendment Freedoms Must Not Be Overbroad.* Closely related to the "compelling interest" doctrine is the overbreadth doctrine that "has recently come to the center of first amendment adjudication." Note, *The First Amendment Overbreadth Doctrine,* 83 H.L.R. 844, 846 (1970). That doctrine helps assure that the legislation on its face in fact is necessary to serve a compelling governmental interest, rather than going further than necessary so as to include within its sweep some activities that under

the First Amendment may not constitutionally be regulated as well as some that may. "The objectionable quality of . . . overbreadth does not depend upon the absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application .... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432-433 (1963).

Thus, in "a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). Even a "clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford,* 408 U.S. 104, 114 (1972).

To determine whether the sweep of a statute is overbroad, the Court normally must look to the face of the statute rather than to a particular application. "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either,

until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights." *Gooding* v. *Wilson,* 405 U.S. 518, 521 (1972), quoting from the opinion of White, J., in *Coates* v. *City of Cincinnati,* 402 U.S. 611, 619-620 (1971).[15]

The majority opinion in *Mitchell* gave no consideration to the overbreadth doctrine, and perhaps understandably so in view of the utilization of the "rational basis" test applicable to economic legislation rather than the "compelling interest-necessity" test which more recent decisions have firmly established where legislation encroaching upon First Amendment freedoms are involved. Thus, the *Mitchell* majority limited its consideration of the Hatch Act to its application to a single employee. 330 U.S., at 92. In this regard also, therefore, it has been outmoded by the passage of time.

4. *The Mitchell Decision Should Be Reconsidered in This Case.* The Government Brief (p. 61) contains the rather astonishing suggestion that there "is no occasion for re-examining" the *Mitchell* decision in this case. Such a re-examination perhaps would not strictly

[15] The overbreadth doctrine has, of course, been discussed and applied in many other decisions of this Court in recent years. Some of them are *Police Department of Chicago* v. *Mosely,* 408 U.S. 92, 101-102 (1972); *Dunn* v. *Blumstein,* 405 U.S. 330, 342-343 (1972); *United States* v. *Robel,* 389 U.S. 258, 265-268 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11, 18-19 (1966); *Dombroski* v. *Pfister,* 380 U.S. 479, 486-487 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508, 512-517 (1964). See, generally, Note, *The First Amendment Overbreadth Doctrine, supra.*

be necessary if this Court decides that the Hatch Act's prohibition is void for vagueness by reason of its incorporation of the pre-1940 decisions of the CSC since, as the court below noted (346 F. Supp., at 580, 585), that issue was not reached in *Mitchell*. But the Government, of course, argues that the Act is not unconstitutionally vague, and the court below grounded its decision upon the overbreadth and chilling effect of the statute upon its face (346 F. Supp., at 583-585) as well as upon vagueness. In doing so, that court expressly concluded that *Mitchell* should not be "considered binding" because subsequent decisions "which developed the 'least restrictive alternative' test for governmental incursions into the area of free speech, undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based" (346 F. Supp., at 585).

The Government itself (Brief, at 53-57) has recognized the necessity of attempting to meet the overbreadth argument, and in arguing (Brief, at 57-61) that the statute nonetheless should not be considered on its face it seeks in effect to rely upon the "reasonably related" (Brief, at 60) or "rational basis" test that underpinned *Mitchell*. This Court could, of course, readopt the *Mitchell* reasoning and reaffirm that decision after re-examination, although we submit that it could not do so consistently with the many decisions we have discussed above. But however that may be, we do not see how the Court can avoid a re-examination of *Mitchell* in view of the decision below and the arguments made here, unless it limits its decision to a holding that the statutory provision in question is void on its face for vagueness.

Moreover, even if that provision is held to be void for vagueness as we think it should (see pp. 48-54, *infra*), we urge the Court to re-examine Mitchell and discard its outmoded "rational basis" approach to legislation restricting the political speech and associations of government employees. While some lower Federal and State courts have recognized that *Mitchell* no longer can be regarded as controlling in view of subsequent developments in the law, others have regarded that decision as being decisive until expressly overruled by this Court. See pp. 16-17, *supra*. And, if the Congress should consider new legislation, it would be faced with similar uncertainty as to whether a mere "rational basis" will suffice or whether it must precisely tailor any such legislation so as to adopt only the least drastic alternative necessary to serve a compelling governmental interest. In short, the *Mitchell* decision itself has a chilling effect upon First Amendment freedoms, as long as it continues formally unreversed, by inhibiting lower courts and legislative bodies from affording existing and proposed laws restricting political activities of government employees the rigorous scrutiny that present-day constitutional doctrines require. Assuming that we are correct in our view that *Mitchell* no longer reflects prevailing constitutional doctrines, no purpose will be served by delay in overruling that decision other than to further delay the necessary re-examination of the manifold legislation—Federal, State and local—that now restricts the political activities of millions of government employees. *Cf., Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967).

In *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967), this Court "conclude[d] that policemen, like teachers

and lawyers, are not relegated to a watered-down version of constitutional rights." By giving *Mitchell* the burial it deserves in this case and in the *Broadrick* case,[16] this Court can go far towards assuring that government employees generally—including many policemen, teachers and lawyers—"are not relegated to a watered-down version of constitutional rights" that are the most fundamental to our system of government—the First Amendment rights to actively participate in the political process through speech, association with others, and political campaigning, generally.

B. The Hatch Act Is Not Necessary to Protect A Compelling Governmental Interest and Is Overbroad.

The Government urges (Brief, at 9-11) that the Hatch Act's prohibition against covered government employees taking "an active part in political management or in political campaigns" serves four objectives: it assertedly (1) "diminishes the likelihood that the

[16] The *Broadrick* case directly involves the issue of whether the *Mitchell* approach, or modern constitutional doctrines, should be applied to State and local statutes regulating political activities. The Oklahoma statutory provisions there involved seem to be as vague as the Hatch Act's provisions involved in this case (see pp. 13-14, *supra*) so that the decision in that case also possibly could be limited to the vagueness issue. See, *e.g.*, *Mancuso* v. *Taft*, 341 F. Supp. 574, 582 (D.R.I., 1972); *Gray* v. *City of Toledo*, 323 F. Supp. 1281, 1288-1289 (N.D. Ohio, 1971); *Huerta* v. *Flood*, 103 Ariz. 608, 447 P.2d 866, 868-869 (1969); and *City of Miami* v. *Sterbenz, Fla.*, 203 So.2d 4 (1967), which held similar State or local statutes to be unconstitutionally vague. But the considerations discussed above also suggest that the Court make clear in that case that the "rational basis" approach of Mitchell no longer has any relevance to the constitutionality of State and local legislation restricting the political activities of government employees.

employee will allow partisan political predilections to interfere with the impartial execution of the government's business in accordance with policies dictated by Congress," (2) "makes it impossible for the party in power to turn the federal civil service into a useful instrument for affecting the outcome of elections," (3) prevents erosion of public confidence in the impartial administration of the federal government," and (4) "serves to assure that government employees will not be or feel themselves compelled to engage in unwanted partisan political activities in order to curry favor with their superiors and enhance their prospects for continued employment or for advancement." Only the second such asserted objective is claimed to have been voiced in the Congress, however, and this Court in *Mitchell* referred to the Act as being rationally related to the promotion of the efficiency of the government service (330 U.S., at 96-99), while recognizing "that political neutrality is not indispensable to a merit system for federal employees . . ." (330 U.S.,at 100).

We do not question the interest of the Federal government, or of a State or local government, in assuring that its employees do not neglect their official duties so as to engage in political activities (or for other reasons) and do not utilize their government positions either to obtain or to afford political favoritism or to advance personal political interests. Narrowly drawn and precisely worded legislation tailored to fit those objectives and to go no further very likely is, we believe, within the power of Congress to enact. But the Hatch Act goes far beyond what is necessary in that regard, and on the other hand, is shot through with exceptions, exemptions and inconsistencies that under-

cut any assertion that the interests it serves are compelling.[17]

1. *Necessity To Serve A Compelling Interest.* The issue as to whether a statute is necessary to serve a compelling governmental interest and the issue as to whether it is overbroad, often involve similar considerations. If a statute goes further than is necessary to serve a compelling government interest, it obviously is overbroad. The issues are not identical, however, so we will treat them separately. The "compelling interest" test is not a "mathematical formula," but rather "emphasizes a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." *Dunn* v. *Blumstein,* 405 U.S. 330, 342-343 (1972).

In making this scrutiny it is significant not only that a statute goes too far in the light of its asserted purpose (overbreadth), but also that it does not go far enough if that purpose truly constitutes a compelling interest. Thus, in *Dunn,* the asserted purpose of a durational residency requirement on eligibility to vote, in limiting the vote to those knowledgeable about the issues involved in State elections, was belied by the fact that longtime residents who were uninformed about those issues were not disqualified. *Id.,* at 357-360. An alleged compelling necessity to prohibit picketing of schools in order to prevent disruption of classes was undermined

[17] The Oklahoma statute involved in the *Broadrick* case appears to go even further in the scope of its prohibitions on political activities of covered employees, and is also riddled with exceptions. See pp. 13-14, *supra.* Hence, that statute almost certainly must fall if the Hatch Act is invalid.

by an exception for picketing in connection with labor disputes, in *Police Department of Chicago* v. *Mosely*, 408 U.S. 92, 100-102 (1972). In *Bullock* v. *Carter*, 405 U.S. 134, 148-149 (1972), Mr. Chief Justice Burger for this Court rejected a contention that a filing fee required of candidates in primaries was justified as being necessary to serve a compelling state interest in defraying the cost of elections, in part because if that were so a filing fee also would have been required of candidates in general elections. So, too, whether "classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Kramer* v. *Union School District*, 395 U.S. 621, 632 (1969). See, also, *Cipriano* v. *City of Houma*, 395 U.S 701, 704-706 (1969).

We submit that the purported necessity of the Hatch Act to serve the objectives asserted by the Government, and the allegedly compelling nature of those objectives, also are undermined by the exclusions and partial exemptions from the Hatch Act. See pp. 11-12, *supra*. For example, the purported objectives of diminishing the likelihood that government employees will "allow partisan political considerations to interfere with the impartial execution of the government's business in accordance with policies dictated by Congress" and in preventing erosion of "public confidence in the impartial administration of the federal government" must be either illusory or without compelling force in view of the exclusion of the heads and assistant heads of departments—some of the persons short of the President who have the most power and the most opportunity and

often the most motivation to "allow partisan political considerations to interfere with the impartial operation of the government's business in accordance with policies dictated by Congress" and thus to erode "public confidence in the impartial administration of the federal government."

If the objective is to avoid turning federal employees "into a useful instrument for affecting the outcome of elections," or if that objective is compelling, why is it that the restrictions on the political activities of federal employees are relaxed in regard to the very elections in which they might reasonably be expected to have the greatest influence—local elections in the Washington and Virginia suburbs of the District of Columbia and in other localities where federal employees constitute more than half the voters? If restrictions on the political activities of "industrial" or non-policy making employees are necessary to serve any of the purported objectives, why is that not so for employees of The Alaska Railroad insofar as municipal elections are concerned, or of teachers and researchers employed by the District of Columbia or by State or local governments (but not those employed by the United States) in regard to all elections?

This is not to say, of course, that the Hatch Act could be rendered constitutional merely by removing its exemptions or exclusions, or that that should be done. The statutory overbreadth, which we discuss next, is far more serious in its impact upon the freedom of government employees to engage in political activities. We submit, however, that the exclusions and exemptions, as well as the overbreadth, are revealing of the fact that the Congress did not in enacting the Hatch

Act truly tailor that statute to fit compelling governmental objectives.

2. *Overbreadth.* As we have noted (p. 31, *supra*), the "breadth of legislative abridgment [of First Amendment freedoms] must be viewed in the light of less drastic means of achieving the same basic purpose." Moreover, it "plainly is incumbent upon the" Government "to demonstrate that no alternative forms of regulations would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963). See also, *e.g.*, *Dunn* v. *Blumstein*, *supra* at 343; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 517 (1964). The Government's Brief, in its discussion of the overbreadth issue (pp. 53-57), makes no attempt to meet that burden.[18] In any event, it would not seem to be an impossible task to frame legislation plainly and specifically prohibiting employees from basing their actions for the government on political considerations rather than on the policies established by Congress, or prohibiting the giving or seeking of employment or promotion for political reasons, or prohibiting the coercion of subordinate employees by their superiors for political purposes. For example, another provision of the

[18] The Government seeks to make a distinction between what it refers to as "procedural" overbreadth and "substantive" overbreadth, equates the former with the vagueness issue and, although it concedes that the statute may be overbroad even if it is not void for vagueness, somehow concludes that the "substantive" overbreadth issue is not before the Court and should not be considered. We think it plain, however, that the Act, even if construed in the manner urged by the Government, imposes substantial limitations upon the political activities of covered government employees (see p. 10, *supra*), and thus that the issue of whether those limitations go further than the Constitution permits ("substantive" overbreadth) is ripe for consideration.

Hatch Act which is not in issue prohibits a covered employee from using "his official authority or influence for the purpose of interfering with or affecting the result of an election." 5 U.S.C. § 7324(a)(1). See, also, 5 U.S.C. §§ 1502(a)(1) and (2), 7321, 7322, and 7323; 18 U.S.C. §§ 594, 595, and 598-607.[19]

Perhaps it might be simpler from an administrative point of view to prohibit government employees from taking an active part in politics, but that is not the criterion. The fact that "special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes" did not justify Texas in creating in effect a conclusive presumption that persons in the military service who moved into that State did not become domiciliaries, thus freezing them out of the right to vote, rather than developing "more precise tests to determine the bona fides of an individual claiming to have" become a domiciliary. *Carrington* v. *Rash*, 380 U.S. 89, 95, 96 (1965). See, also, *Stanley* v. *Illinois*, 405 U.S. 645 (1972). We think that legislation which in effect creates a conclusive presumption that government employees who actively take part in politics will allow that fact to affect the performance of their governmental duties, utilize it to gain promotion, etc., is equally impermissible.

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[19] So, too, uncontested provisions of the Oklahoma statute involved in the *Broadrick* case prohibit such things as discrimination in employment because of "political . . . opinions," the use of "official authority or influence" to secure employment or promotion or to influence "the vote or political action of any person," the giving, receipt or solicitation of money or other valuable consideration on account of employment or promotion, etc. 74 Okla. Stat. Ann § 818 (first five unnumbered paragraphs).

The overbreadth of the Hatch Act's prohibition against taking "an active part in political management or in political campaigns" is emphasized by the fact that it applies to the covered employees' political activities while off duty or on leave of absence as well as while on the job, and does not otherwise make any distinction between political activities engaged in by an employee in his capacity as a citizen and those done in his capacity as a government servant (as, *e.g.*, whether he endorses a candidate merely in his own name or also by reference to his government position), or as to whether or not his political activities in fact compromise his position, affect his performance or are related to his duties as a government servant. The overbreadth of the Act in that regard under modern constitutional standards is demonstrated, we believe, when considered against *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), and *Wood* v. *Georgia,* 370 U.S. 375 (1962).

In *Pickering,* this Court set aside a school board's dismissal of a teacher from employment for sending a letter to a newspaper criticizing actions of the board and its superintendent in connection with the handling of bond issues and the allocation of financial resources —matters of political controversy in the community. In so doing, the Court stated, among other things, that:

> "What we have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the

school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S., at 572-573.

Similarly, in *Wood*, this Court reversed a contempt conviction of a Georgia county sheriff for making a public statement criticizing a grand-jury instruction in connection with a current political controversy. Among other things, this Court rejected a contention that "because the petitioner is the sheriff of Bibb County and thereby owes a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen." 370 U.S., at 393. That contention was rejected "under the circumstances of this case" because the statement was made by the petitioner in his capacity as a private citizen rather than in his capacity as sheriff, and there was "no evidence that the publications interfered with the performance of his duties as sheriff or with his duties, if he had any, in connection with the grand jury's investigation." *Id.*, at 393-394.

The application of those decisions to the Hatch Act's prohibition, which applies without regard to whether the prohibited political activities are taken by an employee in his capacity as an employee or in his capacity as a private citizen and without regard to whether there is any evidence that the political activities interfered with the performance of his duties as an employee, seems plain. This is pointed up, moreover, by the decision of the Fifth Circuit in *Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir., 1971). In invalidating for overbreadth a similar prohibition in a city ordinance

prohibiting employees of the city fire department from taking "an active part in any primary or election . . . or prominently identifying themselves in a political race with or against any candidate for office," the Fifth Circuit stated that "as *Pickering* teaches us, where the political activities of a public employee are unrelated to the performance of his duties he is to be treated for purposes of adjudicating his First Amendment rights as a 'member of the general public.' " *Id.*, at 475.[20] See, also, *Mancuso* v. *Taft*, 341 F. Supp. 574, 580 (D.R.I., 1972); *De Stefano* v. *Wilson*, 96 N.J. Super. 592, 233 A.2d 682, 687 (1967).

The overbreadth of the Hatch Act in this regard is further emphasized by the fact that it makes no attempt, even by the use of rough categories, to relate its restrictions upon political speech and associations to the job performed by a covered employee. For example, those restrictions are as applicable to industrial-type workers, such as the "roller" or mechanic in a government mint who was involved in the *Mitchell* case, even though it is virtually impossible that their job performance could be influenced by political considerations, as to policy-making or administrative employees.[21] While we do not think that such rough categorization would be sufficient to save the Act under present-day constitutional standards, its absence vividly demonstrates the Act's failure even to attempt to comply with those standards.

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[20] The Fifth Circuit first concluded that the "rational basis" approach of the *Mitchell* decision has been eroded by subsequent decisions of this Court and should not be followed. 448 F.2d, at 471-474.

[21] In 1970, the Federal government employed about 1,980,000 white collar workers and about 575,000 blue collar workers. Statistical Abstract of the United States (1972 Ed.), at 404.

The overbreadth of the Act's prohibition against taking "an active part in political management or in political campaigns" also is emphasized by the fact that, with some irrational exceptions, no distinction is made in regard to the nature of the political campaign or political office involved. That prohibition is equally applicable to all campaigns or elections for Federal offices, for State offices and for local offices, except for "non-partisan" elections and a partial exemption for some (but not nearly all) of the covered employees, in regard to local elections.[22] As we said in our Statement of the case (p. 11, *supra*), whether the political campaign is for local dogcatcher or President of the United States, and whether the employee performs janitorial work or fills an important policy position, the identical restrictions may apply.

In *Evans* v. *Cornman,* 398 U.S. 419 (1970), this Court held that Maryland could not disqualify residents of a "federal enclave" (the grounds of the National Institute of Health) located in that State from eligibility to vote in elections held in the State. In so doing, the Court pointed out that those persons are subject, with minor exceptions, to the laws of the State (*id.,* at 424-426), and that: "In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of

[22] The manner in which the partial exemption as to some employees for local elections undercuts the purported compelling nature of the asserted objectives of the Act, is noted at pp. 38-39, *supra.* This is also true of the exception for so-called "non-partisan" elections. As the Commission on Political Activity of Government Personnel pointed out, that distinction is unworkable and unrealistic, since one's commitment to a person, issue or candidate is not necessarily dependent upon identification with a political party. See p. 12, *supra.*

other ballot propositions, appellees have a stake equal to that of other Maryland residents." *Id.*, at 426. This is even more true of Federal employees generally since, unlike those living on federal enclaves, they are fully subject to State and local laws. See p. 3, *supra*. It seems certain, therefore, that a State could not disqualify Federal employees domiciled in the State from eligibility to vote in its elections.

The close connection between the right to vote for a candidate and the right to be a candidate was noted by this Court in *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972); and we think it obvious that a government employee's equal stake in an election comprehends all aspects of that election and of the preceding campaign —the issues, the candidates, the effectiveness of the campaign by one side or the other—and not merely the bare right to vote. See pp. 26-29, *supra*. Thus, a State almost certainly could not deny either residents of federal enclaves or federal employees generally the right to participate actively in State and local political campaigns, any more than the State can deny them the right to vote. And, such invidious discrimination against a group of citizens is no more permissible on the part of the Federal government than it is on the part of a State government. *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642 (1969).

In short, even assuming that there may be some political campaigns and elections as to which the political activities of government employees may be restricted, an indiscriminate prohibition of political activities as to all elections, regardless of the stake of the employees in the election or of its relationship to

his employment, goes far beyond permissible constitutional limits.[23]

For all these reasons, we submit that the Act's prohibition upon covered government employees taking "an active part in political management or in political campaigns" is overbroad, is not limited to the least drastic available alternative, and either is not necessary to serve a demonstrated compelling governmental interest or is not tailored so as to go no further than necessary in view of that interest.

3. *The Scope of the Invalidity.* Perhaps in recognition of the vulnerability of the Hatch Act under current constitutional doctrines, the Government suggests in its Brief (pp. 57-60) that the prohibition against taking "an active part in political management or in political campaigns" should not be invalidated on its face, but rather that if necessary the Court should pick and choose among the various provisions of the CSC regulations purporting to explicate that prohibition. Those regulations, however, merely purport to list some (but not all) of the types of political activities that the CSC considers to be prohibited. Like the statute, moreover, the regulations do not distinguish

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[23] State and local laws have been held invalid by some courts for overbreadth at least in part for their failure to distinguish between the different kinds and levels of political campaigns and elections in prohibiting political activites by government employees. *Fort* v. *Civil Service Com'n of County of Alameda,* 38 Cal. R. 625, 392 P.2d 385, 388 (1964); *Kinnear* v. *City and County of San Francisco,* 38 Cal. R. 631, 392 P.2d 391, 392 (1964); *Bagley* v. *Washington Township Hospital District,* 55 Cal. R. 401, 421 P.2d 409, 416-417 (1966); *Minielly* v. *State,* 242 Or. 490, 411 P.2d 69, 77-78 (1969).

between those political activities that affect the performance of an employee's government duties and those that do not, and generally make no distinctions based on the nature of the employee's government position or of the particular campaign or election involved. See 5 C.F.R. §§ 151.122, 733.122.

Furthermore, the statute is not the CSC regulations, and in its operative language comprises a single sentence, stating only that a covered employee may not "take an active part in political management or in political campaigns." Hence, there is no way "to narrow its indiscriminately cast and overly broad scope without substantial rewriting," which the Court cannot do. *Aptheker* v. *Secretary of State, supra* at 515. See also, *e.g., United States* v. *Robel,* 389 U.S. 258, 262 (1967), and pp. 31-32, *supra.* The statute's prohibition is, therefore, invalid in its entirety.

C. The Hatch Act Is Overly Vague.

We fully share the view of the court below that the provisions of the Hatch Act in question are too vague and ambiguous to meet constitutional standards. See 346 F. Supp., at 580-583. In view of the comprehensive discussions of that issue in the opinion below and in Appellees' Brief, however, we shall limit our discussion in this *amicus* brief to the following observations:

1. The oft-repeated general standard applied by the Court in this area, deriving from *Connally* v. *General Const. Co.,* 269 U.S. 385, 391 (1926), is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." While all statutes must meet this test, an additional constitutional value is involved

"where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' [as] it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972). Hence, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278, 287 (1961); *Smith* v. *California,* 361 U.S. 147, 151 (1959). See also, *e.g., Ashton* v. *Kentucky,* 384 U.S. 195, 200 (1966); *Baggett* v. *Bullitt,* 377 U.S. 360, 372 (1964).

2. The demonstration by the court below, from an analysis of the language of the provisions of the Hatch Act, that "men of common intelligence must necessarily guess at its meaning and differ as to its application," confirms what the Commission on Political Activity of Government Personnel discovered through investigating the actual understandings (or lack thereof) of Federal government employees. Those investigations led that Commission to find "compelling evidence that the existing law unduly confuses and restricts more than 4.5 million Federal, State and local public employees," and to reach the unanimous view that any limits upon the political activities of those employees "should be clearly and specifically expressed . . ." See p. 10, *supra.*

3. The Government contends that the legislative history of the Act demonstrates that "it was the interpretation of the [Civil Service] Commission, as reflected in the materials adverted to by Senator Hatch,

rather than the [pre-1940] decisions themselves, that the Congress intended to incorporate" (Brief, at 37; see, also, pp. 22-24, 35-37).

a. The Government does not make clear whether the "materials adverted to by Senator Hatch" to which it refers are the "card" listing 18 categories of prohibited conduct, the "excerpt" from a CSC pamphlet purportedly setting forth "a somewhat more detailed exposition of the prohibition as construed at that time by the Commission" (Brief, at 37), or both. For example, on page 37 of its Brief, it seems to include both, but on page 24, after discussing the legislative history, it says "the interpretations which appear on the card."

b. Elsewhere in its brief, however, the Government concedes that "Congress specifically considered and rejected the possibility of trying to list specific restrictions itself, preferring the incorporation-by-reference approach" (Brief, at 48, fn. 18), and refers back to legislative history (pp. 24-25) in which "proponents of the bill" rejected a suggestion of "opponents of the legislation" that the Congress itself define the prohibited conduct "by taking the 18 statements on Senator Hatch's card and using them for the definition of political activity;" not because it was simpler to incorporate those "18 statements" by reference, but rather because, as urged by Senators Barkley and George, the proponents preferred "flexible" language because if they used specific language they "might not include many other things which ought to be included . . ."

4. In specifically responding to the vagueness argument (Brief, at 45-53) the Government primarily relies on the current regulations of the CSC, rather than upon either the "18 statements on Senator Hatch's card" or the excerpt from a CSC pamphlet, to provide the necessary definiteness, even though (as noted

above) it argues elsewhere that what the statute incorporates by reference is either those "18 statements" or both those "18 statements" and the "excerpt."

a. The Government concedes (Brief, at 47-48) that the listing in those regulations of "13 permissible activities and 13 prohibited activities" is "not a complete catalogue of all conduct that could come within the Hatch Act's prohibition," because partisan "politics in the United States is composed of a complex and multi-faceted variety of activities" and "the concept and scope of political activity changes with the passage of time and the growth and development of our political institutions." The other side of this coin, of course, is that millions of government employees must guess which of the "multi-faceted variety of activities" not mentioned in the regulations come within the Act's prohibition, and are faced with the possibility that an act or an utterance apparently not prohibited today might be prohibited tomorrow if the CSC should happen then to regard it as one of those caught up in the changes "in the concept and scope of political activity" that occur "with the passage of time and the growth and development of our political institutions."

b. Elsewhere in its Brief (pp. 74-75), the Government concedes that the CSC, in its "current regulations and publications," has "made certain minor changes from the 1939 interpretation" contained in the "materials submitted by Senator Hatch to the Congress," including "elimination of the prohibitions against discussion of liquor questions, betting or wagering on elections, and participating in a political parade as the member of a musical organization or band;" and also that the "prohibition regarding publication of letters or articles in newspapers has been significantly

modified . . . ." Moreover, the Government quotes (Brief, at 75-76) an affidavit in the record by the CSC General Counsel stating, among other things, that "we attempt to administer the Hatch Act in the context of currently accepted constitutional doctrine and other legal doctrines," and if such doctrines conflict with the Act "it is our policy that the current doctrines by which we are bound will prevail." If the Congress intended to incorporate into the Act by reference the "materials submitted by Senator Hatch to the Congress" as the Government contends at some points in its Brief, where does the CSC get the authority to reject or modify some of the prohibitions listed in those "materials" or in effect to rewrite those prohibitions to the extent it deems necessary to make them comply with "currently accepted constitutional doctrine and other legal doctrines?"

c. More broadly, where does the CSC obtain authority to issue any rules or regulations interpreting the Act's prohibition against taking "an active part in political management or in political campaigns," in the light of the following statement in the Government's Brief (p. 43):

> "The original version of Section 15 reported out of the Senate committee would have conferred rule-making authority on the Commission in defining prohibited acts of political management and campaigning, but when opponents of the Hatch Act challenged this rule-making provision as an unconstitutional delegation of legislative power to the Commission, the incorporation-by-reference approach was substituted. See pp. 20-21, *supra*. All that this signified, however, was a congressional unwillingness to give the Commission a free hand to redefine, and possibly to expand, the scope of the prohibition (see, *e.g.*, 86 Cong. Rec. 2928); in-

stead, Congress chose to establish the definitional standard itself, basing it upon the Commission's contemporary interpretation of prohibited political management and campaigning."

5. If one collects the various statements about this aspect of the Hatch Act from the different compartments in which they have been scattered in the Government's Brief, and strips them of the Government's rhetoric, we suggest that they add up to something like this:

> The Congress sought to provide the necessary definition to the broad and indefinite statutory language through incorporation by reference of the prohibitions defined in the materials referred to by Senator Hatch; on the other hand, the Congress refused to so define the statutory language in the Act because those specific prohibitions might not go far enough and the Congress thus preferred to retain the Act's more "flexible" language.
>
> In any event, the Court should not look to the prohibitions defined in the materials referred to by Senator Hatch, but rather to those defined in current CSC regulations. This is so even though the Congress refused to give the CSC authority to issue regulations defining the prohibitions of the Act and preferred instead the incorporation-by-reference approach, and even though the regulations do not track the materials referred to by Senator Hatch and purport instead to reflect current legal doctrines.
>
> Even if one looks to those unauthorized regulations, he will not find a catalogue of all the activities prohibited by the Act. Others of the great variety of multi-faceted political activities in which government employees may want to engage also may be prohibited, under the "flexible" language of the Act, or at some indefinite future

time may become so, without any further action by the Congress or the CSC to amend the statute or the regulations.

In view of this merry-go-round, we suggest that the Court need go no further than a close reading of the Government's Brief in order to understand why the court below, the Commission on Political Activity of Government Personnel, these *amici,* and many government employees are uncertain about the extent of the political actions, speeches and associations which are, and which are not, prohibited by the Hatch Act.

CONCLUSION

The Court should overrule its *Mitchell* decision, hold that the Hatch Act's prohibition on taking an "active part in political management or in political campaigns" is unconstitutional under present-day constitutional doctrines, and therefore affirm the decision below.

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No. 72-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,
APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, ET AL.

On Appeal from the United States District Court for the District of Columbia

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v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
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On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE APPELLEES

QUESTION PRESENTED

Whether the prohibition of Section 9(a) of the Hatch Act against federal employees' taking "an active part in political management or in political campaigns" (as statutorily defined by reference to pre-1940 determinations of the Civil Service Commission) is so vague and overbroad as to be invalid on its face under the First Amendment's guarantees of free speech and association.

STATUTES AND REGULATIONS INVOLVED

(1) Section 9(a) of the Hatch Act of August 2, 1939, 53 Stat. 1147, 1148, was codified into positive law without substantive change by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 525, and the sentence of that section challenged here now appears at 5 U.S.C. § 7324(a)(2). For simplicity in this brief, it will be referred to throughout as Section 9(a). Section 9(a), as amended by the Act of July 19, 1940, 54 Stat. 767,[1] read in its entirety (the single sentence challenged here appearing in boldface):

> Sec. 9. (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. **No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns.** All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations

[1] This has been the only substantive amendment to Section 9(a). It added the words "and candidates" at the end of the third sentence.

with foreign powers or in the Nation-wide administration of Federal laws.

(2) Section 15 was added to the Hatch Act by the Act of July 19, 1940, 54 Stat. 767, 771. As codified into positive law by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 525 it appears at 5 U.S.C. § 7324(a) and reads in its entirety:

> For the purpose of this subsection [7324(a)(2)], the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(3) Section 18 was added to the Hatch Act by the Act of July 19, 1940, 54 Stat. 767, 772. As codified into positive law by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 526, it appears at 5 U.S.C. § 7326 and reads in its entirety:

> § 7326. Nonpartisan political activity permitted
>
> Section 7324(a)(2) of this title does not prohibit political activity in connection with—
>
> (1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or
>
> (2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

(4) 5 C.F.R. § 733.111:

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge, or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fundraising function; or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

(5) 5 C.F.R. § 733.122:

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

STATEMENT

The National Association of Letter Carriers, AFL-CIO, six local Democratic and Republican committees, and six individual federal employees subject to Section 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2) (sometimes herein collectively called the "Letter Carriers") brought this action challenging the constitutionality of the political activity prohibition of that section. They filed the suit on their own behalf, on behalf of all members of the organizational plaintiffs, and on behalf of all employees subject to the political activity prohibition of the Hatch Act.

The complaint (App. 3-11) alleged that members of the class represented by plaintiffs either had engaged in, or desired to engage in, conduct within Section 9(a)'s prohibition against taking "an active part in political management or in political campaigns" and accordingly were subject to enforcement or threats of enforcement to the detriment of their rights of free speech and association. (App. 6-11).

A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282, 2284, to hear and determine plaintiff's application for an injunction restraining the enforcement of Section 9(a)'s prohibition for repugnance to the Constitution. All three judges agreed that plaintiffs adequately represented all federal employees subject to Section 9(a)[2] and certified that the suit was maintainable as a class action under Rules 23(b)(1) and (b)(2), FEDERAL RULES OF CIVIL PROCEDURE. (J.S. 1a, n. 1, 22a). The three judges also

[2] The court rejected plaintiffs' claim to represent state employees subject to an identical prohibition at 5 U.S.C. § 1502(a)(3). (J.S. 1a n.1, 19a-23a). Hence, the constitutionality of that provision is not directly presented by this case.

agreed that the National Association of Letter Carriers and certain individual plaintiffs, and the class they represented, had a direct interest in challenging Section 9(a)'s constitutionality and that their complaint presented a justiciable case and controversy (J.S. 1a, n. 1, 4a, 15a, n. 1, 20a-22a). Neither of these holdings is challenged here.

The district court then held, one judge dissenting, that Section 9(a)'s political activity prohibition was unconstitutional, "in that its provisions are impermissibly vague and overbroad when measured against the requirements of the First Amendment to the Constitution." (J.S. 14a). The court granted an injunction against enforcement but, *sua sponte,* stayed its order pending review by this Court. (*Ibid.*).

SUMMARY OF ARGUMENT

The district court held that the constitutional barrier to vague and overbroad statutes restricting the exercise of First Amendment rights requires invalidation of Section 9(a) of the Hatch Act insofar as it prohibits approximately 2.8 million federal employees (App. 154), on pain of dismissal, from taking "an active part in political management or in political campaigns." Section 15 of the Act defines the proscribed conduct as those acts which, before July 19, 1940, had been prohibited "by determinations of the Civil Service Commission under the rules prescribed by the President."

Twenty-six years ago, in *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), a narrow 4-3 majority of this Court sustained a particular application of Section 9(a) but explicitly reserved consideration of

Section 15 (330 U.S. at 103-04). *Mitchell* upheld Section 9(a) only insofar as it prohibited a roller at the Philadelphia mint from serving, during off-duty hours, as a ward executive committeeman and, on election day, "as a worker at the polls and a paymaster for the services of other party workers." (330 U.S. at 94).

Unlike *Mitchell,* this case presents a justiciable challenge to the entire range of political activities comprehended in Section 15. It squarely presents questions of vagueness and overbreadth under the First Amendment's guarantees of free speech and association which the Government concedes (J.S. 9) the *Mitchell* opinion did not explore. Thus, what was left open by *Mitchell* for further examination is now directly presented for decision.

The Hatch Act's laudable objective of insuring efficient and even-handed conduct of public business free from politically-motivated official coercion cannot insulate Section 9(a) from judicial inquiry to determine whether, on its face, the statute is overbroad or void for vagueness. It has been an enduring precept of this Court that statutes restricting the exercise of First Amendment rights of expression and association cannot be so vague as to be uncertain in their application. This is particularly true where, as here, the First Amendment rights involved have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971). In case after case the Court has made clear that "broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

Section 9(a) of the Hatch Act does not merely r
strict fundamental political rights as a peripheral
incidental matter. The central purpose of its politic
activity prohibition is to regulate and limit the exe
cise of our most basic freedoms, political speech an
association. The importance of the robust politic
self-expression so sharply limited by the Act mak
its vagueness and overbreadth especially malignant.

The political activity prohibition of Section 9(a
however construed, bars millions of federal employe
from engaging in a wide and ill-defined range of publi
affairs activities that are "more than self-expression"
they are indeed "the essence of self-government.
Garrison v. *Louisiana,* 379 U.S. 64, 75 (1964). Th
irony of Section 9(a) is that the more effectively a
employee expresses his opinion on political subjects
candidates, a right expressly preserved by Section 9(a
the more likely he is to be caught in the trap of th
political activity prohibition.

Although the Government formulates the "Questio
Presented" as the constitutionality, *on its face,* of th
Hatch Act's political activity prohibition, the Gover
ment then proceeds to sidestep that question. It pr
sents no defense of Section 9(a) as *Congress* wrote i
but only of the statute "as construed" by the Civ
Service Commission in a regulation issued in 197
more than 30 years after the statute's enactment. (
C.F.R., Part 733). Moreover, even this regulatio
neither clarifies the statute's impermissible vaguene
nor narrows its excessive breadth.

For example, the Hatch Act's ban on "solicitin
votes" leaves an employee possibly, but not certainl

vulnerable to dismissal where the "solicitation" consists merely of telling another voter which candidate the employee favors. Despite the statutory and regulatory exception permitting an employee to express his opinion as an individual, publicly and privately, on political subjects and candidates, any communication by an employee on this subject might be treated by the Commission as having the forbidden effect of soliciting votes. With such an uncertain line between permitted and prohibited conduct, a prudent employee who wants to keep his job will say nothing. The vagueness of the statute thus operates to produce self-censorship, perhaps the most pernicious and least remediable form of abridgment of speech.

No efforts by the Government to impose order on Section 15's chaotic incorporation-by-reference can solve the worker's dilemma. When a statute talks in riddles, as the district court aptly described Section 9(a)'s enigmatic ban (J.S. 13a), any impulse of an employee toward political self-expression is inevitably "chilled," if not suppressed. Whether he resorts to the statutory language, the Civil Service Commission's regulations, its list of "do's" and "don't's", or the more than 3,000 prior determinations of the Commission (incorporated into Section 9(a) by Section 15, but never available to the public), he is confronted with overlapping, inconsistent, unascertainable and incomprehensible guides to action. The resulting uncertainty coerces the ordinary, prudent federal employee to remain silent where, as a citizen, he may wish—and in a democratic society should be encouraged—to speak and robustly debate.

The Government's heavy burden of justifying infringements on First Amendment rights is not light-

ened by the Act's application to government employees alone, whose ranks have swelled to the millions. The need for efficient, impartial conduct of public business may provide a rationalization for political restrictions otherwise plainly invalid, but these restrictions must still be judged by the same constitutional standards as other infringements of political rights. *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The well-established principles against vague and overbroad restrictions on First Amendment rights, reaffirmed only last Term in such cases as *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), and *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), require affirmance of the district court's holding that the political activity prohibition of Section 9(a) is unconstitutional.

ARGUMENT

Introduction

In any hierarchy of personal freedoms secured by the Bill of Rights, none stands higher than the particular First Amendment rights here sought to be vindicated, namely, the right to speak out on public issues, to assemble peaceably, to discuss politics and to participate in the essential processes of democracy. To prohibit any citizen from taking "an active part in political management or in political campaigns"[3] is directly to prohibit his expression and association.

The Letter Carriers do not challenge—indeed, they wholeheartedly support—the Hatch Act's readily severable prohibitions against activities that are not protected by the Constitution, such as misuse of official

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[3] "It can hardly be doubted that the constitutional guaranty has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971).

authority, coercion, or intimidation for political or any other purposes.[4] See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 590 (1971 ed.).

The Hatch Act's restriction of speech and association is frontal and direct, not peripheral or incidental. *Cf. Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *Cox* v. *Louisiana,* 379 U.S. 559 (1957). Section 9(a)'s political activity prohibition restrains straightforward, verbal and written communication of political ideas, peaceable assembly, and political association. It does not simply *regulate* or *burden* protected conduct, *cf., Healy* v. *James,* 408 U.S. 169, 181-183 (1972); *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960); it absolutely *forbids* many significant forms of speech and association. In short, it cuts across, and cuts off, the exercise by millions of public employees of the most basic rights protected by the First Amendment.[5]

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[4] *E.g.,* 5 U.S.C. § 7321; 5 U.S.C. § 7324(a)(1); 18 U.S.C. ch. 29; for a review of these unchallenged prohibitions, see Civil Service Commission Pamphlet 20, Pt. VIII (May 1966), reprinted at App. 31-37.

[5] That the Act is administered so as to forbid many forms of speech and association is evident from Civil Service Commission Pamphlet 20 (May 1966), which describes the purpose of Section 9(a) as being:

> ". . . to *prevent* those subject to it from *assuming* general political leadership or from *becoming* prominently indentified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office." (App. 22) (Emphasis added).

The only way to *assume* leadership or to *become identified* with a movement, party or faction, particularly one peacefully seeking or resisting political change, is to exercise those forms of speech, assembly and petition that were the central concern of the framers of the Bill of Rights. No other activities lead to the result which the Commission says Section 9(a) is designed to prevent.

The "transcendent value to all society of constitutionally protected expression" has led this Court to apply especially rigorous tests for judging legislation that restricts such expression and association. *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972). The basic question presented here is whether the political prohibition of Section 9(a) meets these basic, accepted constitutional tests.[6]

I. PUBLIC EMPLOYEES ARE ENTITLED TO HAVE IMPAIRMENT OF THEIR FIRST AMENDMENT RIGHTS SUBJECTED TO STRICT OVERBREADTH AND VOID-FOR-VAGUENESS SCRUTINY.

The Hatch Act's prohibition against active political management and campaigning cannot be judged against any relaxed constitutional standard simply because its application is limited to millions of government employees.

In recent years this Court has consistently held that persons do not shed their constitutional rights to free-

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[6] *First*, that Congress recognized and carefully considered the full array of rights of political expression and association embraced within Section 9(a)'s prohibition against active political management and campaigning;

Second, that after such consideration, Congress justifiably concluded that specific, identifiable and paramount public interests required Section 9(a)'s broad restriction of the exercise of such rights by government employees;

Third, that the sweeping restriction chosen by Congress represents no greater interference with First Amendment rights than is necessary to protect identified, incompatible, and paramount public interests; and

Fourth, that the statute clearly and unambiguously informs employees subject to it of what forms of expression and association are prohibited and what forms remain permitted.
E.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972).

dom of speech or association when they enter public service. *E.g., Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). These cases have repudiated the "hoary epigram from the pen of Mr. Justice Holmes"[7] that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[8]

Yet, this epigram, and the judicial universe it mirrored, underlay this Court's use in *United Public Workers* v. *Mitchell, supra,* 330 U.S. 75 (1947), and in *Oklahoma* v. *Civil Service Comm'n.*, 330 U.S. 127 (1947), of the "rational relationship" test to validate the Hatch Act's recognized (330 U.S. at 94-95) interference with the exercise of First Amendment rights by government employees:[9] "It is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." 330 U.S. at 101.

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[7] *Hobbs* v. *Thompson*, 448 F.2d 456, 473 (5th Cir. 1971).

[8] *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892). See Van Alystyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Civil Disabilities and the First Amendment*, 78 YALE L. J. 842 (1969); The Supreme Court, 1966 Term, 81 HARV. L. REV. 69, 170 (1967).

[9] See also 330 U.S. at 99, where the Holmes epigram is quoted in a footnote to the sentence immediately preceding the Court's statement that:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."

Insofar as the *Mitchell* and *Oklahoma* decisions condone abridgment of First Amendment rights of Government employees under the lenient "rational relationship" test ordinarily applied to economic regulation, they have been repudiated by more recent and consistent decisions of this Court.[10] The district court so found (J.S. 13a), as did the Fifth Circuit in *Hobbs* v. *Thompson, supra* n. 7.[11] Yet, the Government continues to rely on *Mitchell* and its discarded measure of acceptable infringements on free speech, urging that:

> "In view of the important objectives that Congress sought to attain by this legislation, it was, as this Court held in *United Public Workers* v. *Mitchell*, . . . well within the range of reasonable and permissible choices open to Congress to select a prophylactic approach . . . ." (Brief, 13).

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[10] This case does not, however, require full-scale reconsideration of the *Mitchell* and *Oklahoma* cases. In *Mitchell*, the Court held that the Congress could forbid a government employee from engaging in particular, identified political activity. That power of Congress is not challenged here, because Congress has never, prior to passage of Section 9(a), conducted the inquiry which might validate particular prohibitions against political activity. Until Congress (a) considers the full range of impairment of First Amendment rights that will result from its action, (b) finds certain impairments necessary, and (c) legislates clearly and in the least restrictive manner, the nature and extent of the Government's need for a blanket prohibition will remain unknown. The *Oklahoma* case was limited to upholding the authority of Congress to regulate the conduct of state employees whose salary is federally funded. That issue is not present here. (See *supra*, at 7, n.2).

[11] *Accord*, Mancuso v. Taft, 341 F. Supp. 574 (D.R.I.), *appeal docketed*, No. 72-1180, 1st Cir. (May 23, 1972); Fort v. Civil Service Commission, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Reptr. 625 (1964); Minielly v. State, 242 Ore. 490, 441 P.2d 69 (1966); Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); DeStefano v. Wilson, 96 N. J. Super. 592, 233 A.2d 682 (Super. Ct. 1967).

Such wholesale deference to the legislature would, as the Fifth Circuit observed, make strict overbreadth and void-for-vagueness inquiry impossible. *Hobbs* v. *Thompson, supra* n. 7, 448 F.2d at 472.

First Amendment rights of public employees may collide with the Government's legitimate interest in efficient, even-handed conduct of its business. Yet, countervailing governmental concerns, of undetermined proportions, do not give Congress *carte blanche* to enact an imprecise and sweeping abridgment of First Amendment rights. Rather, the government employer-employee relationship—and the important public obligations of public employees—represent no more than an assertible source of justification for precisely drawn and otherwise valid regulation of speech and association. Even when the Congress justifiably concludes that some such regulation is demanded by overriding public interests—*as it has not done here*—the Constitution still requires Congress to take the least restrictive approach to achieve the identified ends and to express any restriction of First Amendment rights with precision and clarity.

II. THE POLITICAL ACTIVITY PROHIBITION OF SECTION 9(a) IS, ON ITS FACE, VOID FOR VAGUENESS.

The district court held that the single sentence of the Hatch Act which prohibits federal employees from taking "an active part in political management or in political campaigns," as defined by Section 15's incorporation-by-reference of some 3000 prior administrative determinations, is so vague as to be unconstitutional on its face. The district court found that "no one can read the Act and ascertain what it prohibits."

(J.S. 7a). More than a quarter century earlier, Mr. Justice Black made the same observation:

> "[W]hat federal employees can or cannot do, consistently with the various civil service regulations, rules, warnings, etc., is a matter of so great uncertainty that no person can even make an intelligent guess. This was demonstrated by the government's briefs and oral arguments in this case." *United Public Workers* v. *Mitchell, supra,* 330 U.S. 75, 105, 110 (Black, J., dissenting).

The Government here states the "Question Presented" as "whether the prohibition of the Hatch Act against federal employees taking 'an active part in political management or in political campaigns' is unconstitutional *on its face.*" (Brief, 2) (Emphasis added.) Yet, nowhere in its brief does the Government address this question. Not even suggesting that the statute can stand on a reading of its own words,[12] the Government defends the Act only "as authoritatively construed by the Commission." (Brief 12). Before reaching that limited defense, the Court first must determine whether *Congress* satisfied the mandate of the First Amendment.

A. SECTION 9(a): ITS PROHIBITION AND LEGISLATIVE EXCEPTIONS.

In 1939, when Congress first prohibited federal employees from taking "an active part in political management or in political campaigns," it showed sufficient concern about the breadth and ambiguity of its lan-

[12] *Cf. Oestereich* v. *Selective Service Board,* 393 U.S. 233, 238 (1968).

guage as to carve out two specific exceptions, which it included in the original Section 9(a):

> *First,* covered employees "shall retain the right to vote as they may choose . . . ."
>
> *Second,* covered employees "shall retain the right . . . to express their opinions on all political subjects."

A year later, when Congress amended the Hatch Act, it apparently still deemed the political activity prohibition either so unnecessarily broad or so unclear as to add to it: (a) the unusual and complex definition of Section 15, (b) the expansion of the second exception quoted above to include "candidates",[18] and (c) a third exception in Section 18, permitting certain, limited "non-partisan" activity and "partisan" activity in connection with constitutional amendments, referendums, and like questions. (Section 18 is set out in full at p. 7 *supra.*)

While designed to limit Section 9(a)'s political activity prohibition, these three exceptions underscore its fundamental ambiguities and lack of other limitations. They invite questions as to what, if any, limits there would be on the scope of Section 9(a)'s prohibition in their absence, and their presence fails to impart the clarity required for a statute regulating conduct protected by the First Amendment.

Did the Congress in 1939 include the voting rights exception as part of Section 9(a) because it recognized that, without it, a person of ordinary intelligence might reasonably read the political activity prohibition to

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[18] Section 2 of the Act of July 19, 1940, 54 Stat. 767, now codified at 5 U.S.C. § 7324(b).

forbid voting? What other genuine statutory purpose does this exception serve?

Would the prohibition of Section 9(a), absent its second exception permitting expression of opinion, forbid all expression of opinion on "political subjects and candidates"? Does this exception permit a federal employee to express his opinion on any political subject or candidate regardless of circumstances, audience, or content? If not, where, how, and by whom are lines to be drawn between expression of opinion, which is permitted, and "soliciting votes in support of or in opposition to a partisan candidate . . . .", which the Commission has found to be prohibited? 5 C.F.R. § 733.122(b)(7). Does the face of the statute provide the answers to these questions directly affecting constitutional rights of millions of citizens? Obviously not.

The Government represents that "a government employee at a social gathering can *freely* express his political opinions to others present . . . ." (Brief, 48) (Emphasis added.) One of the most prevalent forms of political campaigning today is the neighborhood or block party at a private home. Does the Government mean to say that an employee may attend such a party and "*freely* express his political opinions to others present"?

Does Section 9(a)'s prohibition against taking "an active part in political management or in political campaigns," on its face, give adequate notice to an employee that he retains his right to freely express political opinions at social gatherings, as the Government represents he may safely do? Is this freedom without limit? Does the right to express political opinions at social gatherings include the right to solicit votes for

or against a candidate? When does a social gathering become part of an organized political campaign? What if the host or hostess solicits votes or contributions for a partisan candidate? What if the host is a partisan candidate's campaign manager? What if a partisan candidate's campaign manager is an invited guest? And what if that manager uses the gathering as an occasion to solicit votes or contributions? In such circumstances, does the legality of the employee's expression hinge upon his awareness of the campaign manager's position and purpose? Can an employee ascertain the correct answers to the foregoing questions from the face of Section 9(a)? Obviously not.

Any attempt, such as the Government makes (Brief, 38), to apply the canon of construction that specific provisions overcome more general ones encounters the difficulty of determining which has more specificity: the prohibition against active political participation or the exception purporting to permit expression of opinion on political subjects and candidates. Any doubts as to whether the prohibition or the exception applies in a particular situation would have to be resolved by a prudent, conscientious employee in favor of the prohibition. See *Dalehite* v. *United States,* 346 U.S. 15, 31 (1953); *United States* v. *Dickson,* 15 Pet. (40 U.S.) 141, 165 (1841) (Story, J.). The result is self-censorship of protected speech and association. The statute's vagueness increases its "chilling effect," inevitably leading federal employees to "steer far wider of the unlawful zone." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958), quoted in *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109.

The foregoing questions, and the many other ambiguities inherent in Section 9(a)'s language, are not

"confined to a relatively few uncommon or borderline situations," as the Government suggests. (Brief, 52). These questions are not rhetorical or academic, but directly affect the daily conduct of millions of citizens engaged in the public service. This case challenges the constitutionality, not the grammar, of an Act of Congress. *Cf. Cole* v. *Richardson,* 405 U.S. 676, 684 (1972). Section 9(a)'s prohibition is infected with uncertainties that broadly inhibit exercise of the most basic rights of political expression and association. The district court saw how thoroughly Section 9(a)'s ambiguities stifle constitutional freedoms: "In the end everything may appear political, all speech may intend to influence, and conformity is imposed in the fashion of more regimented, less democratic governments." (J.S. 10a).

The Government's failure to defend Section 9(a) on its face constitutes an implicit concession that it can be saved, if at all, only by the legislative definition contained in Section 15, considered together with administrative interpretations, which we now consider, in turn.

B. SECTION 15's DEFINITION, INCORPORATING BY REFERENCE PRIOR ADMINISTRATIVE DETERMINATIONS.

In 1940, Congress enacted Section 15 of the Hatch Act to define the political activity prohibition of Section 9(a). (Act of July 19, 1940, 54 Stat. 767, 771). As codified into positive law by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 525, Section 15 now appears at 5 U.S.C. § 7324(a) and reads in its entirety:

> For the purpose of this subsection [7324(a)(2)], the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning

which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

I. Section 15 Incorporated All Pre-1940 Political Activity Rulings Filed with the Court.

The statutory referent of Section 15 could conceivably be either:

(a) the 3,000-odd Commission determinations in all individual pre-1940 cases,[14]

(b) some undefined and unknown subset of (a) above which were "in effect" on July 19, 1940,

(c) the 1939 edition of the Commission's pamphlet on political activity (C.S.C. Form 1236) (App. 89-116), or

(d) a card prepared by Senator Hatch and entered on the Congressional Record which listed 18 very general categories of prohibited political management and campaigning. 86 CONG. REC. 2943 (1940).

Any and all of these possibilities compound the inherent ambiguities of Section 9(a)'s prohibition.

The plain language of the statute, the legislative history, and thirty years of administrative construction by the Commission support the first possibility, *i.e.*, that Section 15 refers to all of the thousands of

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[14] The first time that these determinations ever were collected and made available outside of the Commission's archives was in response to an order of the district court in this case (App. 53). The Government has filed ten sets for review by this Court. (Brief, 41 n. 14). The pre-1940 determinations are not included in the bound three-volume *Political Activity Reporter*, ten copies of which the Government also has filed. (Brief, 71 n. 5).

individual pre-1940 Commission determinations. For purposes of determining the statute's vagueness *vel non*, the "in effect" limitation, which distinguishes the first possibility from the second, is meaningless since prior to that date the Commission never overruled a single determination, and subsequent thereto the Commission has never sought to identify which determinations were effective on July 19, 1940. It must be concluded either that Section 15 incorporates all of the determinations which the Government filed with the district court here or else that even the Government does not know which of those are incorporated and which are not. (We suggest that even a casual inspection of this bulky material, which has been filed with this Court, will accentuate vividly the problems of ascertaining what the statute does or does not prohibit.)

Both the majority and dissenting judge below read Section 15 as incorporating all of the thousands of prior Commission rulings which the Government filed in this case. The district court said that Section 15 "incorporates by reference over 3,000 rulings made by the Commission between 1886 and 1940." (J.S. 4a). The dissenting judge found, even more emphatically, that "it is, of course, true that Section 15 incorporated the decisions themselves and not Form 1236's summary of their holdings . . . ." (J.S. 38a).

(a) The Commission's Consistent Administrative Interpretation

Over the years, the Commission uniformly has taken the position that *all* determinations "in effect" on July 19, 1940, constitute the definitional referent of Section 15. *E.g., Massingham,* 1 P.A.R. 792, 795 (1959); *Smith,* 1 P.A.R. 222, 223, 229 (1947); *Floyd,* 1 P.A.R. 145, 152 (1947); *Shivy,* 2 P.A.R. 293, 296 (1947); see Rose, *A*

Critical Look at the Hatch Act, 75 HARV.L.REV. 510, 517-22 (1962). Until it took the contrary litigation posture in this case, the Commission never expressed any other view of Section 15.

Perhaps the best exposition of the Commission's understanding of Section 15 is set out in a 1949 analysis and selected compilation of Hatch Act cases prepared by a long-time Commission hearing examiner:

> "So, if in Sections 9 and 12 of the Hatch Act Congress had simply prohibited those subject thereto from taking 'any active part in political campaigns,' there always would have remained an opportunity for logically reasoned conflicting arguments as to what falls within the scope of the prohibition. But Sec. 15 of the Hatch Act makes for inflexibility in interpretation, establishing what may be considered a mandatory principle of *stare decisis* .... Thus, as the Commission has often had occasion to say . . ., Congress gave the then effective determinations of the Commission the force of law.
>
> "Interested persons, therefore, may ask, 'How are we to know what the determinations of the Commission were, as of the date of enactment of Sec. 15?'
>
> * * *
>
> "The public cannot go to original sources to study the Commission's pre-Hatch Act determinations, because they are embodied in diffused files and records of the Commission ....
>
> "One way—perhaps the best—of arriving at the answer is through this volume . . . ." J. IRWIN, HATCH ACT DECISIONS OF THE UNITED STATES CIVIL SERVICE COMMISSION, 39-40 (1949).

In 1967, the Commission reiterated that the individual pre-1940 rulings were incorporated by Section

15, not merely a summary. At that time, the Commission criticized the inflexibility and rigidity that Section 15 imposed upon its regulatory efforts, declaring that:

> "Changes in the prohibitions of the law are difficult to accomplish under the existing statute. The present language tends to bind the Commission to its pre-1940 precedents. We feel this is no longer desirable or justifiable." [15]

In 1971, the Commission once again reaffirmed this view of Section 15 when it published the first purported "index" of its pre-1940 determinations.[16] That "index," which is not readily available to the ordinary employee, does no more than classify the thousands of pre-1940 rulings by such uninformative headings as "condoning activity," "engaging in activity by indirection," "making remarks and statements," and "preparing literature." It does not report, or even digest, the rulings themselves. The introduction to the "index" sets out the Commission's position as to the continuing significance of the cases cited therein:

> "All of the cases were decided by the Commission in the years 1886-1940. These 'rule decisions' were incorporated into the Hatch Act by the addition of section 15 of the Act through the 1940 amendments thereto (54 Stat. 767)." (1 P.A.R. i).

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[15] From Civil Service Commission Chairman John W. Macy's statement to the Commission on Political Activity of Government Personnel (hereinafter referred to as "CPA"), 3 CPA REPORT, 12, 17 (1967). Chairman Macy was accompanied by the other two members of the Commission, both of whom endorsed his statement. *Id.*, at 24. One of these commissioners is now Chairman, and the other still serves on the Commission.

[16] That index is contained in volume 1 of the Commission's *Political Activity Reporter*, ten copies of which have been filed with the Court. (Brief, 71 n.5) (hereinafter cited as "P.A.R.").

All of the determinations filed with the district court are included in the index; yet, some other unknown numbers of pre-1940 rulings were omitted from the "index" and were not filed with the court because their precedential value was "negligible." (*Ibid.*)

Just last year, the Commission's General Counsel repeated the position that Section 15 incorporated the individual pre-1940 rulings, rather than a summary, testifying before a Senate Committee that, "with the line the Congress drew in terms of party management and political campaigning, the definitions in some 4,000 [sic] cases that have been decided since 1886 are what they are." *Hearings on the Hatch Act Before the Senate Post Office and Civil Service Committee,* 92d Cong. 2d Sess. 62 (1972).[17]

(b) The Legislative History

There were no congressional hearings on Section 15, either as originally reported out of committee, when

[17] In 1966, the Congress enacted a law creating a twelve-member commission to study political activity of government employees and to report back in a year. Public Law 89-617 of Oct. 3, 1966, 89th Cong. 2d Sess., 80 Stat. 868. This "Commission on Political Activity of Government Personnel" (sometimes hereinafter referred to as "CPA") included two Senators, two members of the House, two administration officials, and six public members, and included three former chairmen of the Civil Service Commission (1 CPA REPORT, 65-66). It was chaired by Arthur S. Flemming, formerly Secretary of Health, Education and Welfare, and a former chairman of the Civil Service Commission. After a year's study of the Hatch Act, this Commission concluded:

> "The Hatch Act, in a single sentence, sets a general policy proscribing political activity. Through the technique of adoption by reference, Congress incorporated *all* then existing Civil Service Commission rulings and decisions adopted prior to 1940. In consequence, the law incorporates a lengthy series of administrative definitions of 'permitted' and 'prohibited' political activities that are not readily available." 1 CPA REPORT, 19 (Emphasis added.)

it would have delegated rule-making authority to the Commission,[18] or on Senator Hatch's floor substitute, the presently enacted and incorporation-by-reference version. The only report on the latter does no more than repeat its language verbatim, without comment. H. R. Rep. No. 2376, 76th Cong. 3d Sess. 11 (1940). Congressional debate on Section 15 supports the conclusion that prior rulings by the Commission in the thousands of individual cases it adjudicated before 1940 were incorporated, not merely some summary of them.

During the Senate debate on Section 15, opponents of the bill questioned what "determinations" it incorporated. Responding to these objections, Senator Barkley, the majority leader and an active supporter of the bill, suggested alternative language referring to Civil Service Rule I rather than to prior determinations. 86 Cong. Rec. 2950. A colloquy ensued, as follows:

> "Mr. Barkley. Mr. President, the Senator has objected to section 15 in substance—
>
> "Mr. Brown. Strenuously.
>
> "Mr. Barkley. On the ground that we undertake to write into law all the hundreds and thousands of interpretations of the Civil Service Commission on all the cases they have had before them. In order to meet his objection, as I thought, I was suggesting that we do not write into the law their interpretations but write into the law their rule, which is almost identical with the rule which we set up in the law itself [*i.e.*, Section 9(a)] . . . ." *Ibid.*

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[18] S. Rep. No. 1236, 76th Cong. 3d Sess. (1940).

Senator Barkley's suggestion never was formalized into a motion. Instead, Section 15 was passed in the form which he, a staunch supporter, understood to incorporate "all the hundreds and thousands of interpretations of the Civil Service Commission on all the cases they have had before them." *Ibid.*

This same understanding was forcefully expressed without contradiction, by Section 15's opponents. Senator Brown of Michigan declared:

> "We are asked to fix into hard and fast statute law every interpretation which has heretofore been made. Not a single one of those interpretations may be hereafter changed, no matter how wrong, no matter how far out of line those interpretations may be. We are making not only the rules, but we are making the interpretations, statute law . . . . In other words, there could be no building up of a body of judicial interpretations which might hereafter change. It would be hard and fast." 86 CONG. REC. 2949.

Senator Schwellenbach of Washington commented that "we will have to go through the minutes of the Civil Service Commission for the last 50 years and find every minute of the Commission which they have ever written into their book." *Id.* at 2949-50.

There was no pertinent debate on Section 15 in the House of Representatives. See *id.* at 9463-64.

After study of this legislative history, an academic commentator on Section 15 concluded that "there was an accumulation of convincing evidence of a congressional purpose to adopt thereby the individual pre-Hatch Act Commission determinations, rather than the pamphlet summary [*i.e.*, Form 1236 (1939 ed.)]." Rose, *op. cit. supra* at 24-25, 514.

(c) The Government's Positions in This Case

At one point in its brief, the Government asserts that "the intent [of Section 15] was to incorporate only those rulings that continued to represent viable interpretations of the restrictions as of 1940 . . . ." (Brief, 35). However, the Government suggests no way for a federal employee to distinguish "viable" determinations from those moribund on July 19, 1940. Subsequently, and inconsistently, the Government urges—without reference to any support for its view—that "it was not the decisions themselves that were the primary source of the incorporated definition of prohibited political activities, but rather the then-current interpretation of the concept by the Commission." (Brief, 36).

Various positions taken by the Government here as to what Section 15 incorporated cannot be squared with each other. Moreover, those positions are inconsistent with the record developed in the court below. In response to the district court's order to file copies of those determinations "*which are incorporated* into the Hatch Act by reference under the provisions of Section 15 thereof,"[19] the Government filed thousands of determinations. On that record, any reasonable and prudent employee, whose job depends on compliance with Section 9(a)'s prohibitions, would avoid any political activity that had been condemned by *any* filed ruling, if he were able to find, read and understand them all. The Government apparently concedes that the Constitution would not tolerate any such restriction on First Amendment rights, saying that, "if all that an employee of ordinary intelligence could look

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[19] App. 53 (Emphasis added.)

to in order to ascertain what conduct Congress prohibited in the Act were a compilation of pre-1940 administrative rulings, the statute might be vague and imprecise . . . ." (Brief, 41).

Even if some, but not all, of the thousands of individual, pre-1940 determinations are incorporated into Section 9(a) by Section 15, employees would still encounter grave difficulties in understanding the scope of Section 9(a)'s political activity prohibition. Any uncertainty as to what Section 15 incorporates leads to equivalent uncertainty as to what forms of political expression and association Section 9(a) prohibits. It must be remembered that Section 15 is the definition that *Congress* gave to Section 9(a). It cannot be overlooked.

2. Section 15 Renders It Impossible to Determine What Political Activity Remains Permissible.

There are at least two possible views of the impact, upon Section 9(a)'s prohibition, of whatever it was that Section 15 incorporated by reference. The statutory scheme reasonably could be construed to require a federal employee—and the Commission—to judge the legality of particular conduct by determining whether or not an analogue exists in the incorporated material. Alternatively, the referent incorporated by Section 15 could be viewed merely as an upper limit on the Commission's enforcement authority under Section 9(a). Regardless of which alternative is chosen, Section 15's definition does not clarify Section 9(a)'s prohibition.

All three judges below (court: J.S. 7a; dissenting judge; J.S. 30a) agreed that the incorporation technique operated only to provide an upper limit. The Government here adopts this position. (Brief, 41).

Yet, neither alternative is manifestly correct. Accordingly, the unusual statutory scheme leaves a prudent, conscientious employee no choice but to remain silent unless he can be certain that his speech is not covered by any one of the thousands of incorporated determinations.

Even if Section 15 only provides an upper limit, there is no ready way for employees, or the Commission, or a court reviewing Commission action, to determine where that limit is.

Unable to find adequate clarification in Section 15, the Government places its entire reliance upon the Commission's "authoritative construction" of the political activity prohibition (Brief, 11-12, 41-53), in effect reading Section 15 out of the statute as a meaningful definition of Section 9(a).

C. THE COMMISSION'S "CONSTRUCTION" OF THE POLITICAL ACTIVITY PROHIBITION

In the district court, the Government asserted that "this suit does not involve the validity or construction of the regulations published at 5 C.F.R. 733.122 or the administration of the Hatch Act." (App. 77, ¶4). This position was accepted by the district court (App. 79, ¶3) and is not challenged here. It leads logically to the Government's formulation of the sole question presented to this Court:

> "Whether the prohibition of the Hatch Act against federal employees taking 'an active part in political management or in political campaigns' is unconstitutional *on its face.*" (Brief, 2) (Emphasis added.)

Abandoning the position it took before the district court and failing to address the question presented,

the Government proceeds to bottom its defense of Section 9(a) on the proposition that the Commission's 1970 regulation rescues the 1939 statute's prohibition from any inherent vagueness and overbreadth.

Before holding Section 9(a) unconstitutionally vague, however, the district court gave thorough consideration to the Civil Service Commission's efforts to make it comprehensible. (J.S. 8a-9a). Far from "ignoring the role played by the regulations," as the Government charges (Brief, 47), the court found that the Commission "has acted responsibly in attempting the impossible task of applying the uncertain and conflicting provisions of the Act." (J.S. 9a). Finding the best efforts of the Commission of no avail, the court found that:

> "Uncertainties abound and they will produce excessive caution and stifle words and acts not explicitly prohibited. Small wonder that even those concerned with enforcement share the sense of uncertainty and confusion, as the record before us attests. [Footnote omitted.] Thus do generalized, vague prohibitions become misunderstood and misapplied and serve to limit expression by millions of Federal Government employees, and even their families, in a society where political speech and uninhibited, robust, wide-open debate on public issues are at the essence of self-government." (J.S. 10a).

For three independent reasons, the Commission's interpretations of the Hatch Act's political activity prohibition do not and cannot cure that prohibition's vagueness.

1. No Administrative Construction of a Statute Restricting Exercise of First Amendment Rights Can Cure Inherent Vagueness in That Statute.

The Government has not cited a single case supporting its argument that an administrative construction by regulation, or otherwise, can furnish needed clarity to an otherwise vague federal statute restricting First Amendment rights.[20]

An attack upon such a statute requires the Court to determine whether *Congress* has sufficiently delineated the conduct it intended to prohibit. Serious congressional imprecision in the First Amendment area

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[20] On pages 42 and 43 of its brief, where the Government addresses the impact of administrative construction on the vagueness issue, twelve cases are cited. Three hold state statutes unconstitutionally void-for-vagueness on their faces, even though one statute had "intricate administrative machinery for its enforcement." *Keyishian, Gooding, Cox* v. *Louisiana.* Two hold state action unconstitutional without passing on the facial validity of any statute. *Shuttlesworth, Edwards.* In one of these, *Shuttlesworth* v. *City of Birmingham,* the state unsuccessfully sought to defend challenged criminal convictions by relying on a state court's narrowing construction. Another of the Government's cases upheld a state oath requirement, accepting an interpretation given it by the agency which, unlike the Civil Service Commission here, had been explicitly entrusted with power to make a definitive interpretation. *Law Students Research Council.* In one case cited by the Government this Court upheld a federal statute on the basis of its own narrowing construction. *Harriss.* In that case, the Court rejected a broader construction urged by the Government. One Government case does not bear, in any way, on the question of relying on a narrowing administrative or judicial construction to save the constitutionality of a statute. It merely upholds the power of Congress to assimilate subsequently adopted state statutes in a criminal statute. *Sharpnack.* None of the remaining four cases cited by the Government involve any constitutional issue, much less a challenge to a statute restricting freedom of speech and association. *Udall* v. *Tallman, Perkins* v. *Matthews, Griggs* v. *Duke Power Co., United States* v. *City of Chicago.*

cannot be remedied by a regulation promulgated by an administrative agency. Prior decisions of this Court make plain that the statute itself must be sufficiently clear so that the Court can determine that the Congress made the "legislative judgment," *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940), that overriding governmental interests require regulation of speech and association.

> "[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of Government, are not endowed with authority to decide them." *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959).

When presented with a constitutional challenge to a federal statute, this Court itself has, on occasion, given the statute a narrowing construction in order to save it. *E.g., Oestereich* v. *Selective Service Bd., supra; United States* v. *Harriss*, 347 U.S. 612 (1954). On the other hand, "it must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. *Scales* v. *United States*, [367 U.S. 203, 211 (1961)]," *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); see *United States* v. *Robel*, 389 U.S. 258, 267 (1967): "The task of writing legislation which will stay within [constitutional] bounds has been committed to Congress."

Here, the Government goes far beyond asking the Court to construe narrowly, or even to rewrite, the Hatch Act's one sentence prohibition against active political management and campaigning. It asks the Court (Brief, 58-59) to give "authoritative" effect to an administrative regulation issued more than 30 years after the statute was enacted and in face of deliberate congressional withholding of rulemaking authority. At the best, the Commission's regulation amounts to nothing more than benign prosecutorial assurance and confirms Section 9(a)'s inherent vagueness and imprecision.

As this Court said just last Term:

> "Where First Amendment interests are affected, a precise statute 'evincing a *legislative* judgment that certain specific conduct be . . . proscribed,' *Edwards* v. *South Carolina,* 372 U.S. 229, 236 (1963), assures us that the *legislature* has focused on the First Amendment interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner* v. *Louisiana,* 368 U.S. 157, 200, 202 (1961) (Harlan, J., concurring in judgment)." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109, n. 5. (Emphasis added.)

Mr. Justice Brennan has cogently explained why the language used by the Congress in any statute restricting First Amendment rights must satisfy the test of constitutional clarity, without regard to any subsequent administrative construction:

> "Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often

not answerable or responsive in the same degree to the people . . . .

"Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered."

United States v. *Robel, supra,* 389 U.S. 258, 269, 276 (Brennan, J., concurring).

The argument that Congress delegated legislative responsibility over free speech and association to the Civil Service Commission is untenable as a matter of sound constitutional principle.

2. Since the Congress Deliberately Withheld Rulemaking Authority, the Commission Cannot Lessen the Statute's Vagueness.

Expressly recognizing constitutional obstacles to delegating authority to regulate First Amendment rights, Congress unequivocally refused to grant authority to the Civil Service Commission to define the forms of political activity in which government employees may engage. The legislative history of Section 15 plainly refutes the Government's argument "that Congress expected reliance on the Commission's interpretation" (Brief, 44) of Section 9(a)'s prohibition.

Early in 1940, Senator Hatch introduced S. 3046, 76th Cong., to amend the Hatch Act of 1939. 86 CONG. REC. 62. Without hearings, the Senate Committee on Privileges and Elections amended the bill and reported it out favorably on February 26, 1940. S.REP. No. 1236, 76th Cong. 3d Sess. (1940). As reported, S. 3046 proposed a new section authorizing:

"the Civil Service Commission to define the term 'active part in political management or in political campaigns' as that term is used in the prohibitions applicable to Federal employees and in the

prohibitions applicable to State and local officers and employees." *Id.* at 2.

There were two weeks of debate on various amendments to the Hatch Act, much of it directed to the argument that its extension to state and local employees would violate "states' rights."[21] During this debate, there was substantial criticism of the above-quoted Committee version of Section 15 as representing too broad and uncontrolled a delegation of power, with particular reference to First Amendment rights.[22]

Responding to this strong opposition, Senator Hatch offered a substitute Section 15,[23] which is now the law. This substitute was adopted by the Senate on March 15, 1940, the same day it was offered.[24] S. 3046 passed the Senate three days later, on March 18.[25]

Without hearings, the House Judiciary Committee reported S. 3046, with some amendments, but did not change the Senate's incorporation-by-reference version of Section 15.[26] Neither the Committee report nor the floor debate[27] commented on Section 15. The House passed the bill on July 10 with Section 15 unchanged,[28] and the Senate accepted the House amendments the following day.[29]

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[21] 86 CONG. REC. 2338-2987.

[22] *E.g.*, 86 CONG. REC. 2427, 2928-30, (Senator Lucas); *id.* at 2579 (Senators McKellar and Brown); *id.* at 2720-21 (Senators Bankhead and Connally); *id.* at 2865-66 (Senator Minton); *id.* at 2875, 2924-27 (Senator Thomas of Okla.)

[23] *Id.* at 2928, as modified at 2937.

[24] *Id.* at 2958.

[25] *Id.* at 2987.

[26] H. R. REP. No. 2376, 76th Cong. 3d Sess. (1940).

[27] 86 CONG. REC. at 9360-80, 9426-32, 9434-42, 9445-64.

[28] *Id.* at 9463-64.

[29] *Id.* at 9497.

When Senator Hatch offered the present language of Section 15 as a substitute for the Committee's rule-making version, he said, "it does away with the question of delegation of power . . . ." [30] He explained his substitute Section 15 as follows:

> "I am endeavoring to have all employees put under exactly the same rule, and it seemed to me to be very wise not to give the Commission any more power to interpret further in the future." [31]

Senator Hatch later compared the original and discarded version of Section 15 with the substitute that was enacted, saying:

> "Section 15 [the Committee version] gives the Commission power to define the term 'political management and political campaigns' and the power to issue rules and regulations. If that section is stricken out, the Commission will not have that power." [32]

That section *was* stricken out.

If the Congress had enacted the Committee version of Section 15, this case would be governed by the proposition considered in the preceding section: that a legislature cannot delegate to an administrative agency authority to decide what First Amendment rights require regulation and authority to determine the form, extent, and triggering circumstances of such regulation. Here Congress recognized that the Constitution barred such a delegation and deliberately withheld from the Commission power either to expand or to contract the legislative prohibitions.

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[30] *Id.* at 2928.

[31] *Id.* at 2949.

[32] *Id.* at 2951; see also, 2947-50.

3. The Commission's Various Interpretations of Section 9(a) Are Void-for-Vagueness.

(a) The Commission's 1970 Regulation

Since the Government relies chiefly upon the Commissions's 1970 regulation as "a definitive statement of [employees'] obligations and responsibility under the Act" (Brief, 44), that regulation must be analyzed for its clarity, or lack thereof. Its key section, 5 C.F.R. § 733.122(b), lists 13 categories of prohibited activities. Introducing this list is the familiar catch-all clause: "include but are not limited to—" (*Ibid.*)

The "include but are not limited to" caveat confers completely open-ended discretion upon the Commission. It leaves the Commission free to enforce the statute's prohibition in an arbitrary or discriminatory manner. *Cf. Baggett* v. *Bullitt,* 377 U.S. 360 (1964). This escape hatch for the Commission's exercise of discretion underscores the double-edged threat to federal employees of Section 9(a)'s vagueness: if he misreads its reach and speaks in a manner that the Commission deems to be covered, he may lose his job; otherwise he engages in self-censorship.

Apart from this open-ended caveat, the regulation's list of 13 categories of "permissible activities," 5 C.F.R. § 733.111, itself affords no protection to employees' rights and does not clarify or limit the statute. This is so because the so-called "permissible" activities are, in fact, permitted only to the "extent consistent with the restrictions imposed by law and this subpart." 5 C.F.R. § 733.111(a). This condition, by returning the employee to the face of Section 9(a), effectively eliminates the list as a reliable guide to action.

Consider, for example, the "permissible activities" category which purportedly permits "a financial contribution to a political party or organization." 5 C.F.R. § 733.111(a)(8). Financial contributions to *candidates* are not mentioned. Since the regulation also provides that "an employee may not take active part in political management or in political campaigns, *except as permitted by this subpart,*" 5 C.F.R. § 733.122(a) (Emphasis added.), the regulation leaves the Commission free to discipline a federal employee for making a contribution directly to a candidate, provided only that it deems the contribution to constitute active political participation, which returns us, full circle, to the vagueness of the statutory language, considered on its face.

When does a financial contribution constitute active political participation? Would direct or indirect financing of a major portion of a political campaign be covered? Given proper circumstances and publicity, would even a modest contribution be covered?[33]

Significant additional areas of vagueness and confusion in the Commission's regulation emerge from comparison of the "permissible activities" with the "prohibited activities." The most constitutionally significant "permissible" activity is the employee's purportedly retained right to "express his opinion as an individual privately and publicly on political subjects

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[33] Assuming that there exist circumstances in which a contribution of money for partisan, political purposes would not be deemed "an active part in political management or in political campaigns," what compelling governmental interest is served by prohibiting contributions of services to a political candidate while permitting contributions of money? This contrast raises questions as to whether the Hatch Act discriminates between employees on the basis of wealth.

or candidates." 5 C.F.R. § 733.111(a)(2). Yet, many forms of political expression of opinion also fall within the regulation's prohibition against "soliciting votes in support of or in opposition to a partisan candidate for public office or political party office." 5 C.F.R. § 733.122(b)(7).

The Commission's regulation fails to inform covered employees of when the Commission will deem expression of opinion on political subjects or candidates to be the "soliciting of votes." Is an employee safe from possible punishment if he expresses his opinion that a particular candidate is undoubtedly the best, or worst, candidate so long as he avoids the final, explicit exhortation to vote for, or against, that candidate?

The uncertainties that arise from the obvious overlap of permitted "expression" and prohibited "solicitation" directly affect the exercise of basic First Amendment rights. The Government's brief exhibits insensitivity to high constitutional values when it persistently dismisses this, and the other ambiguities inherent in the statute and in the Commission's regulation, as involving only "interstitial situations" (*Id.* at 50), or "a relatively few uncommon or borderline situations." (*Id.* at 52). These conflicting permissions and prohibitions paralyze the worker's exercise of the most cherished freedoms safeguarded by the Bill of Rights.

(b) Letters to Newspapers

Examination of the Commission's efforts to provide an authoritative construction of the Act—in one constitutionally significant context—confirms that Section 9(a) fails to give federal employees adequate notice

of what is prohibited and what is permitted and leaves the Commission free to exercise arbitrary prosecutorial discretion. This examination also will serve adequately to demonstrate that the Commission has, in fact, failed to supply clarity to the statute.

The question that we shall seek to answer from the statute, "as authoritatively construed," is:

> *Whether a federal employee may submit a single letter, article, or advertisement to a newspaper of general circulation supporting or opposing a particular partisan candidate, provided he acts independently of any political organization?*

Close reading of the 1970 regulation will not reveal whether a letter is an act of permitted "expression" or an act of prohibited "solicitation." That regulation does prohibit employees from "endorsing or opposing a partisan candidate . . . in a political advertisement, a broadcast, campaign literature, or similar material." 5 C.F.R. § 733.122(b)(10). The Government, in a litigation stance here, classifies a letter as "permitted expression" without citation of authority. (Brief, 40, n.13). Yet, until 1955, when Judge Youngdahl overruled the Commission in *Wilson* v. *United States Civil Service Commission,* 136 F.Supp. 104 (D.D.C. 1955), it had uniformly held that any such letter, article, or advertisement was prohibited. E.g., *Matthews,* 1 P.A.R. 212 (1945); *Rydzynski,* 1 P.A.R. 592 (1951); *Shaw,* 1 P.A.R. 672 (1953).

Shortly after the *Wilson* decision, the Commission ruled that the insertion of a single paid political advertisement was prohibited, even though it appeared in the "To the Editor" column. *Evans,* 1 P.A.R. 679 (1953); see *Gooch,* 1 P.A.R. 830 (1961). This ruling

is effectively preserved in the subsection of the 1970 regulation quoted above.

How narrowly the Commission read *Wilson* comes clear from its decision in *Massingham,* 1 P.A.R. 792 (1959). There, a nursing assistant at a Veterans Administration hospital placed the following advertisement in the Poplar Bluff, Missouri, newspaper of general circulation:

> "TO ALL MY MANY FRIENDS OF POPLAR BLUFF AND BUTLER COUNTY
>
> I want to take this opportunity to ask your vote and support in the election, TUESDAY, AUGUST 7th. A very special person is seeking the Democratic nomination for Sheriff. I do not have to tell you of his qualifications, his past records stand.
>
> This person is my dad, Lester (Less) Massingham.
>
> THANK YOU
>
> WALLACE (WALLY) MASSINGHAM"

(*Id.* at 793).

The Commission found that this advertisement was respondent's "personal action, sponsored by no one else, not known in advance by the candidate" (*Ibid.*), and that "he unquestionably was actuated by admiring affection for his father." (*Id.* at 797). Nevertheless, the Commission found the advertisement to be "clearly within the prohibition of the statute and rule against taking an active part in a political campaign." (*Id.* at 793). Not only did the Commission refuse to follow *Wilson* because it felt compelled to do so by Section 15 (*Id.* at 793-94) and because Massingham paid for his advertisement (*Id.* at 796), it criticized *Wilson* for fail-

ing to take account of pre-1940 determinations which Section 15 incorporated by reference. (*Id.* at 796).

The Commission also responded to *Wilson* by adding two words "soliciting votes" to the warning in its Pamphlet 20 that a government employee "may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction." *E.g.*, P.A.R. Cum.Supp. 32, 60; see Govt. Brief, 75 n.6. The words "soliciting votes" do not appear in the subsection of the Commission's 1970 regulation dealing with advertisements, etc. 5 C.F.R. § 733.122(b)(10).

In the context of Pamphlet 20, the two added words "soliciting votes" afford no help to any employee of ordinary intelligence who wishes to express his opinion in a letter to a newspaper but at the same time desires to conform to the Commission's view of the statute. The palpable purpose of any serious letter to a newspaper "in favor of" a candidate is to solicit votes for him. Moreover, the Commission's decision in *Massingham* entirely ignores the factor identified as critical by the district court in *Wilson*, namely, the absence of evidence that the respondent had acted in concert with others as part of an organized campaign. See 136 F. Supp. at 106. The fact that Massingham paid to have his expression published, and Wilson did not, has no constitutional significance, since both cases concerned individual, unconcerted expression of opinion on matters of public importance.

In summary, the Commission's various efforts to provide an "authoritative construction" for Section 9(a)'s political activity prohibition that will answer the question about submitting political opinion for

publication in a newspaper has led to the following results:

(a) No certain answer can be gleaned from the Commission's 1970 regulation.

(b) From 1940 to 1955, the Commission made its position relatively clear in its pamphlets and rulings: an employee would be punished if he submitted any item of partisan, political advocacy for newspaper publication, regardless of whether it was an unpaid letter to editor or a paid advertisement.

(c) In 1955, in *Wilson,* Judge Youngdahl overruled the Commission and held that writing a letter to the editor could not be prohibited under Section 9(a) unless the author acted in concert with others.

(d) In several cases thereafter and its 1970 regulation the Commission distinguished *Wilson* and ruled that an employee could be punished for submitting even one paid advertisement even if he acted alone.

(e) In response to *Wilson,* the Commission made a meaningless change in its pamphlet and continued to advise employees that sending a single letter to a newspaper "soliciting votes" was forbidden despite *Wilson's* "in concert" rationale.

(f) Now, in 1972 and 1973 as part of this litigation, the Government has declared, without qualification or citation, that "employees are free to write letters on political subjects to newspapers" (Motion to Dismiss (Dist. Ct.), p.4, n.2; see App. 88) and that "a letter to the editor of a newspaper would be permitted expression of opinion." (Brief, 40, n.13).

When the status of the right to publish political opinion without fear of being fired is as fraught with

confusion and contradiction as this summary demonstrates, the underlying regulatory scheme is patently void for vagueness. Moreover, the Commission's refusal to follow the *Wilson* decision, because of contrary incorporated determinations, confirms that the statute's vagueness leaves the Commission free to act in a capricious fashion.

D. EMPLOYEES DO NOT AND CANNOT UNDERSTAND THE POLITICAL ACTIVITY PROHIBITION.

There is abundant proof that most federal employees are bewildered both by the political activity prohibition of Section 9(a) and by the Commission's "authoritative construction." Persuasive and unrebutted evidence of widespread confusion both by those subject to—and those entrusted with enforcing—Section 9(a), confirms that this statute misleads and fails to warn persons of ordinary intelligence of what it forbids.

In 1967, the Commission on Political Activity of Government Personnel [34] commissioned the Survey Research Center, University of Michigan, to conduct a scientific sampling of federal employees to determine their knowledge and opinions regarding political activity.[35] The statistical validity of this survey has been conceded by the Government. (App. 79, ¶ 4).

Particularly pertinent is the test of employees' knowledge of the "do's" and "don't's" of the political activity prohibition. Employees were shown a list of

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[34] See p. 27, n.17, *supra*.

[35] 1 CPA REPORT, 12-13 (1967). The results and methodology of this survey are set out in full in volume 2 of the Commission's Report, 1-64.

ten common types of political activity (*e.g.*, "make a speech at a rally held by a political party;" "put a political sticker on his own car") and asked whether or not they were permitted to engage in each. Not one employee scored higher than eight correct responses; 64.1 percent of all federal employees understood less than half of the selected restrictions. 1 CPA REPORT, 20.

After studying this survey, and after extensive public hearings in six cities across the nation, the Commission found:

> "Faced with compelling evidence that the existing law unduly confuses and restricts more than 4.5 million Federal, State, and local public employees, this Commission proposes a new approach. It recommends that Congress eliminate the confusing array of do's and don't's by clearly defining permitted activities and prohibitions in the statute. The prohibitions would be only those that Congress finds necessary to protect employees against actions that would threaten the integrity, efficiency, and impartiality of the public service." *Id.* at 21.

As appellant in this case, the Commission finds Section 9(a) clear and precise. Six years ago, however, discussing its problems in administering the statute, the Commission recognized the vagueness inherent in the Hatch Act's political activity prohibition, stating:

> "We believe it desirable that the general language of the present Act, 'tak[ing] an active part in political management or in political campaigns,' be made more definitive. The term is qualified to include only those political activities prohibited to employees in the competitive civil service prior to July 19, 1940. However, we are asking in another recommendation that this qualification be repealed. Conditions have changed since 1940. The prohi-

bitions imposed prior to that time may not all be valid in light of present circumstances.

In essence, notwithstanding the present qualifying provision, the present language is somewhat broad and somewhat uncertain. It is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights. *It is uncertain in that it fails to define with clarity and precision the types of activities which are prohibited.*" 3 CPA REPORT, 15 (Emphasis added.)

As the district court found, "indeed, even those most intimately concerned with its enforcement are in doubt and have sought legislative clarification." (J.S. 7a).

In addition, Roger W. Jones, a former chairman of the Commission, who has more than 35 years of experience as a personnel administrator, at the highest levels of the Federal Government (App. 117), and whose expertise is conceded by the Government (App. 150), testified in this case as follows:

"As a former Chairman of the United States Civil Service Commission, I have continued to observe the employee confusion engendered by the vague and indefinite language of the statute as cross referenced to the mass of the pre-1940 decisions. The list of prohibitions growing out of the Civil Service rules is outdated, imprecisely drawn, and consequently so inconsistent as to preclude equitable administration. It follows, I believe, that bona fide Civil Service Commission attempts to explain and apply the statute are bound to result in conflicting decisions because the underlying statute is vague and indefinite. Thus, apart from the fact that the Act prohibits many harmless activities the Act also, because of the incorporation of

the pre-1940 rulings, presents an inherently insuperable problem of construction for those charged with administering it: the Civil Service Commissioners. Although the Commission has published various explanatory pamphlets attempting to clarify the scope of the prohibitions, I think that these attempts, by and large, have not dispelled employee confusion." (App. 120-21).[34]

Under questioning by Judge Gesell, he amplified this statement as follows:

"JUDGE GESELL: Mr. Jones, I had a question on your affidavit that I did want to take this opportunity to ask you to elaborate on a bit. You say on Page six that you have continued to observe the employee confusion engendered by the vague and indefinite language of the statute as cross referenced to the mass of the pre-1940 decisions. Could you give us a little better idea of what you are talking about there?

"THE WITNESS: Yes, I can, sir. In various of my jobs, including the most recent period of service in the Office of Management and Budget and Bureau of the Budget, because of my former experience, I have had even our rather sophisticated and highly graded and highly paid staff come to me on countless occasions to ask whether I thought this, that or the other activity was prohibited by the Hatch Act.

"Above and beyond that I have seen on any number of occasions employees attempt to read Pamphlet 20, or to look at the poster which the Civil Service Commission has the agency post on their bulletin board, with a list of 'do's and don't's

[34] While this testimony was in form of an affidavit, the Government stipulated to its admissibility into evidence, subject only to objection on the ground of relevancy. (App. 148). Mr. Jones also presented live testimony. (App. 150-61).

or permitted and not permitted, and stand there and shake their heads in concern, and I think in some degree of disbelief. Despite all of the efforts of the Commission to explain, there is great confusion today, and I think this is particularly true among the rank and file, with respect to the issue of expressing your views on political opinion.

"The action before you today has been brought on behalf of one of the organizations of our Postal Workers. I have had postal carriers say to me, 'What do I do when a housewife asks me if I have some opinion about this, that or the other kind of Government program?' This kind of confusion is not good.

"There has been a long argument on whether members of carpools may stop at the polls and vote on their way in in the morning, or whether this contravenes the restrictions against carrying people to the polls. The question of serving as an officer at an election—is this to be mixed up as serving as a partisan watcher or checker. I could go on, sir. Is this sufficient?

"JUDGE GESELL: Some of the papers suggest that because of the uncertainties such as you have been talking about, that there may be a tendency on the part of supervisors and others in the Government who are advising Federal employees, to speak in terms of the policy of the Act, and suggest abstention perhaps even beyond that, which the statute itself contemplates. In your experience is that likely, or has that happened?

"THE WITNESS: That is likely, and it has happened. Again, there are many circumstances that I could cite. I have heard important officials of rather large Federal installations make speeches to their staff at the time of political campaigns that were far removed from the actual prohibitions of the Act, and have attempted to tell them, 'I may not be accurate in all of this'—I am

putting this in quotes—'I may not be quite accurate in all of this, but I want you to know it is our policy for you people to stay clear of political involvement.'

"JUDGE GESELL: Do you have any questions?

"MR. ANDERSON [Government counsel]: I have no questions, your Honor." [35]

Although not dispositive, the bewilderment of employees—and enforcement authorities—strongly supports the district court's holding that Section 9(a)'s political activity prohibition is void for vagueness. The record shows that the vagueness of Section 9(a) makes it a sword of Damocles constantly hanging, uncertainly, over the heads of millions of federal employees, inhibiting them in the exercise of rights protected by the First Amendment. The manifest and widespread confusion over the scope of the statute goes not merely to peripheral or borderline issues, it extends to the entire range of meaningful political expression and association protected by the First Amendment.

III THE HATCH ACT'S SWEEPING RESTRICTION ON EXPRESSION AND ASSOCIATION IS OVERBROAD AND IS NOT COMPELLED BY ANY PARAMOUNT GOVERNMENTAL INTEREST.

All conduct subject to Section 9(a)'s political activity prohibition is ordinarily entitled to constitutional protection. Hence, the overbreadth question here is whether the conceded governmental interest in preserving a neutral and efficient merit system for public employees adequately justifies the Hatch Act's blunderbuss encroachment on First Amendment protected rights. The overbreadth doctrine requires the Court to

[35] App. 155-56; there is further evidence of actual employee confusion at App. 122-45.

determine whether the entire prohibitory scheme of Section 9(a) can constitutionally be sustained, not merely whether one or two prohibitions at the outer edges might be excised as superfluous or excessive.

A. CONGRESS FAILED TO FIND, EXPLICITLY OR IMPLICITLY, THAT A SWEEPING RESTRICTION ON SPEECH AND ASSOCIATION WAS REQUIRED TO SAFEGUARD THE MERIT SYSTEM.

The Hatch Act resulted from congressional concern with abuses of coercion, intimidation and misuse of official authority in various federal elections in 1936 and 1938. Congress was properly concerned that the federal merit system might be destroyed unless widespread abuses, entailing misuse of government funds and positions through political coercion and intimidation, were promptly stopped.

The first eight sections of the Act,[36] and the first sentence of Section 9(a), carefully focus on these obvious threats to the integrity, neutrality, and indeed, continued viability of the merit system instituted by the Pendleton Civil Service Act of 1883.[37] These provisions of the Hatch Act are not challenged.

The second sentence of Section 9(a) takes a radically different approach: rather than outlawing the identified evils, it broadly bars millions of federal employees from engaging in otherwise proper and constitutionally protected activities.

The legislative history of the Hatch Act unequivocally refutes any suggestion that the Congress, in its deliberations, found that such restrictions were needed

[36] 53 Stat. 1147, now condified at 5 U.S.C. §§ 7324, 7325, 18 U.S.C. §§ 594, 595, 600, 601, 603, 605. The entire 1939 Act is set out at P.A.R. Cum. Supp. 5-7.

[37] Act of January 16, 1883, 22 Stat. 403.

to eliminate the abuses that had been found and recognized. The summary of the pertinent legislative history of Section 9(a), as enacted in 1939, is set out in the Appendix to this brief. *Infra,* pp. 18a-27a.

As shown by the Appendix, none of the problems that concerned the 1939 Congress arose from the voluntary exercise of speech or association by government employees. Rather, they all stemmed from coercion, intimidation, and misuse of official authority and funds. The supporters of Section 9(a)'s sweeping restrictive provision did not point out a single abuse that could not be eliminated by the direct prohibitions on misuse of office contained in Sections 1 to 8 and the first sentence of Section 9(a). The legislative record is barren of any explanation why straightforward prohibitions against official coercion and intimidation would not be wholly effective to achieve the congressional objectives.

The failure of Congress to make any evaluation of the need for a broadside impairment of First Amendment freedoms to cure particular, identified election abuses probably resulted from familiarity with the identical ban which was contained in existing Civil Service Rule I, but which was limited to classified employees. This approach had been in effect since 1907, when President Theodore Roosevelt promulgated Executive Order 642 under general presidential authority to prescribe rules for the competitive service.[38] Pursu-

[38] Act of March 3, 1871, ch. 114, § 9, 16 Stat. 514, and Civil Service Act of 1883, 22 Stat. 403, 404, pertinent portions now codified at 5 U.S.C. §§ 1301, 3302. Fourteen years previously, as a Civil Service Commissioner, Roosevelt recognized that the Commission "has no power whatever" to construe a rule "about what is deemed proper partisanship in the classified service." ELEVENTH ANNUAL REPORT OF THE CIVIL SERVICE COMM'N 20-21 (1894). There was no change in any pertinent statute between 1894 and 1907.

ant to Executive Order 642, the Commission, in 1907, issued Civil Service Rule I, which, among other things, prohibited employees in the competitive classified service from taking an "active part in political management or in political campaigns." [39] Thirty-two years later, when Congress passed the Hatch Act, it extended the applicability of Civil Service Rule I, including the political activity prohibition, to more employees. In doing so, Congress failed, however, to give the necessary, careful consideration to whether or not there was a compelling governmental interest to justify the Rule's restrictions on exercise of First Amendment rights.

Since Rule I was of executive, not legislative, origin, Congress itself has *never* independently examined the need for its sweeping prohibition. Indeed, from the time of the first Congress until 1907, when President Roosevelt acted by executive fiat, there were various legislative proposals to restrict political activity of government employees. Congress consistently rejected these proposals, frequently referring to the unconstitutional abridgment of free speech and association that they represented. A summary of eighteenth and nineteenth century congressional action is included in the Appendix to this brief. *Infra,* pp. 2a-18a.

For example, the very first Congress defeated, 37-21, a bill that would have prohibited inspectors of distilled spirits "from interfering, either directly or indirectly, in elections, further than giving their own votes, on penalty of forfeiting their offices." [40] Repre-

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[39] TWENTY-FOURTH ANNUAL REPORT OF THE CIVIL SERVICE COMM'N, 104 (1908).

[40] 2 ANNALS OF CONG. 1876-78 (1791).

sentative Fisher Ames objected to the bill on the ground that "it will muzzle the mouths of freemen, and take away with the use of their reason."[41] Half a century later, Senator John C. Calhoun objected to a bill restricting the political activity of federal officers on the ground that "a citizen does not cease to be one in becoming a Federal officer."[42] Senator James Buchanan declared that this same bill was worse than the sedition law and called it a "gag law" which would clearly violate the First Amendment.[43] It too was defeated.[44]

Throughout the nineteenth century, as the Appendix hereto details, the various efforts, legislative and executive, to control election abuses by federal employees were most often narrow, clear, and limited to specific abuses rather than sweeping restrictions on voluntary political activity. Thus, it is not surprising that the Civil Service Act of 1883 contained no restrictions on voluntary activity or that no such restriction was suggested during consideration of that law.[45]

The Government argues that, in 1907, after 24 years of experience under the Pendleton Act, "*the Civil Service Commission concluded* that the prohibitions in the Act and Rule against using official authority or influence to coerce the political action of others or interfere with elections did not suffice to control improper political activity by those in office." (Brief, 69) (Emphasis

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[41] *Id.* at 1877.

[42] CONG. GLOBE, 25th Cong. 2d Sess. App. 234 (1838).

[43] *Id.* at 203-10.

[44] *Id.* at 226; See CONG. GLOBE, 26th Cong., 1st Sess. 116, 406 (1840).

[45] See Appendix, *infra*, pp. 10a-13a.

added.) Be that as it may, *Congress* did not then, or later, make any such finding, implicitly or explicitly.

The executive, rather than legislative, origin of the language challenged here increases its vulnerability to constitutional attack. That the language of the political activity prohibition originated in an executive order of sixty-six years ago does not increase its dignity or serve as any shield against constitutional challenge.

The House debates in 1939 on enactment of Section 9(a) reveal why Congress did not then apprehend a need for carefully evaluating the effect of its sweeping restriction of First Amendment rights of government employees. Congress shared the then prevailing notion of constitutional law that, when a person entered government employment, he waived any First Amendment rights that the legislature, in its discretion, might previously have determined that government employees should not exercise. The right-privilege distinction was sharp and distinct for the 84th Congress.[46] Even the most vigorous opponents of Section 9(a) did not criticize restrictions on the First Amendment rights of public employees by reference to the compelling governmental interest test.[47] Even the most vigorous opponent of Section 9(a), Representative Hobbs of Alabama, primarily attacked it as being a retrospective application of a new condition to employees already in service, analogizing its operation to an ex post facto criminal law.[48]

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[46] But see Perry v. Sindermann *supra*, 408 U.S. 593; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[47] See, generally, 84 Cong. Rec. 9594-9638.

[48] *E.g.*, 84 Cong. Rec. 9602, 9622, 9893-95 (Rep. Hobbs).

Acting in the light of these now discarded conceptions of public employees' rights, Congress proceeded to enact Section 9(a) and to prohibit federal employees from engaging in a wide and ill-defined range of activities. It did so without any express finding (or any basis for such a finding) that the prohibition was needed to protect incompatible and paramount government interests or that no less restrictive an alternative would suffice.

B. SECTION 15's DEFINITION AGGRAVATES THE OVERBREADTH OF SECTION 9(a)'s POLITICAL ACTIVITY PROHIBITION.

Whatever reading is given to Section 15, it defines Section 9(a)'s political activity prohibition to cover an extremely broad range of voluntary political activity. Under even its most restricted reading,[49] Section 15 incorporated material that prohibited, among other things, betting or wagering on elections, playing in a band during a political parade, being active in campaigns concerning the liquor question, circulating petitions to state, county, or municipal governments, or supporting the appointment of anyone to an unclassified federal office. (App. 99-100). Under the more generally accepted reading, which links Section 15 to all the thousands of pre-1940 rulings, countless activities are included in the incorporated definition. The

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[49] The most limited reading of Section 15 urged by the Government is that it incorporated "the then-current interpretation of the concept by the Commission" (Brief, 36), which is the one set forth in Form 1236 of September 1939, reprinted at App. 89-106. Although the Government urges that even this incorporation is limited by the three statutory exceptions (Brief, 39), it is clear that Congress recognized no distinctions between the activities embraced within the definitional referent.

district court's sampling is set out in the margin.[50] The Court can find many other incorporated prohibitions

[50] The district court's choice of examples of pre-1940 rulings prohibiting specific activities follows. The phrasing is that used by the district court (J. S. 5a):

(1) made a wager on an election; (Index # 63, Atkins, 31 A.R. 160)

(2) offensively discussed a "political question"; (Index # 24, Hiner, 32 A.R. 141)

(3) Disparaged the President; (Index # 24, Dunham, 32 A.R. 144)

(4) denounced a political party while in a jovial mood due to alcohol; (Index # 24, Bock, 31 A.R. 146)

(5) publicly engaged in a political discussion; (Index # 24, Mure, 34 A.R. 148)

(6) wrote a political letter; (Index # 64, Cain, 32 A.R. 143)

(7) publicly expressed a political opinion; (Index # 24, Chester, 32 A.R. 143)

(8) published a political article; (Index # 51, Nihart, 32 A.R. 143)

(9) wore a political button while on duty; (Index # 7, Ratcliffe, 34 A.R. 144)

(10) stated unsubstantiated facts about ancestry of a candidate; (Index # 54, Smith, 1922 Min. 343)

(11) made offensive political remarks; (Index # 24, Edmonds, 33 A.R. 151)

(12) failed to discourage a spouse's political activity; (Index # 17, Brock, 1935 Min. 209)

(13) stated disapproval of treatment of veterans while acting as a Legion officer in a closed Legion meeting; (Index # 25, Davis, 1935 Min. 154)

(14) was partisan in political views; (Index # 24, Castleberry, 32 A.R. 145)

(15) allowed one's name to be associated with an objectionable political affair; (Index # 35, Woody, 1933 Min. 670)

(16) authored an anonymous political communication; (Index # 9, MacDonald, 1933 Min. 293)

The citation system used here is that suggested in 1 P.A.R. i and ii, and with reference to the index, *id.* at iii-xxvi.

by leafing through the three big volumes of pre-1940 rulings that have been filed.[51]

Although the Government argues that the impact of Section 15 is limited by the Commission's contemporaneous interpretation and further by the First Amendment (Brief, 56-57), the fact remains that Section 15, on its face (which is what is at issue here), not only further confused the meaning of Section 9(a), it also extended it to particular activities whose restriction was not, in 1940, and cannot, in 1973, be justified by any paramount governmental interest.

Indeed, to accept the argument that Section 15 must be read as limited by the contours of the First Amendment would be to read the overbreadth doctrine out of the Constitution. Under the Government's approach (most directly set out in the Affidavit of the Commission's General Counsel, App. 56), every overbroad statute is self-correcting: the limits imposed by the Constitution are automatically applied, and no prohibition that exceeds those limits will be imposed. This Court requires more. Statutes may not *appear* to deny First Amendment rights. If they do, citizens will forbear from exercising their rights, which thus become "chilled". Government-induced self-censorship is no less censorship forbidden by the First Amendment.

C. NEITHER THE COURT NOR THE GOVERNMENT CAN FURNISH THE MISSING FINDINGS OF OVERRIDING INTERESTS NEEDED TO SUSTAIN THE ACT.

To defeat an overbreadth challenge, the Government must demonstrate that a less restrictive ban limited to direct prohibition of recognized, identified abuses will

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[51] Note that the three-volume *Political Activity Reporter*, which also has been filed with the Court, contains no pre-1940 Commission decisions, only a generalized "index" to them.

not suffice to remedy them. Compare *Sherbert* v. *Verner*, 374 U.S. 398 (1963) with *United States* v. *O'Brien*, 391 U.S. 367 (1968); see *Dunn* v. *Blumstein, supra*, 405 U.S. at 343; *Hobbs* v. *Thompson, supra*, 448 F.2d at 470-71:

> "Since public employees make up an ever-increasing portion of the work force, a blanket prohibition upon political activity, not precisely confined to remedy specific evils, would deal a serious blow to the effective functioning of our democracy. In this area, the overbreadth doctrine plays an important role, for it requires the *legislature* to focus narrowly on the particular evils it wishes to combat when speech is at stake." (Emphasis added.)

The needed legislative findings cannot be inferred from the mere fact that the Congress passed the Act. Any such approach would eliminate overbreadth review by the courts, for it represents wholesale deference to the legislative action and obviates judicial evaluation of the basis for restricting First Amendment rights in particular instances.

Faced with the clear failure of Congress to furnish the findings necessary to sustain the statute, the Government made no effort to fill the void. To the contrary, it vigorously resisted the Letter Carriers' efforts to discover evidence relevant to any compelling governmental interest or to the impact on the civil service of less restrictive measures. (See App. 38-51, 70-72, 77-78, 81, 146).

The Letter Carriers proffered evidence that the federal civil service merit system would not be jeopardized by permitting government employees freer exercise of their rights of speech and association. Roger W. Jones, a witness qualified as an expert [52] on federal civil serv-

[52] See *supra*, p. 49.

ice administration, testified that allowing federal employees to engage in many "activities prohibited by the Hatch Act . . . would have no effect, in my judgment, upon the continued effective functioning and impartiality of the Civil Service." (App. 120).

Other evidence which the Letter Carriers called to the court's attention included the findings and conclusion of the Commission on Political Activity of Government Personnel that the political activity prohibition, at least in its present sweeping form, was unnecessary to insure the continuing integrity and vitality of the merit system.[58]

The Letter Carriers also invited the court's attention to 1967 testimony of the Civil Service Commission that the prohibition of Section 9(a):

> "is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights." 3 CPA REPORT, 15.

This represents the official statement of the federal agency charged with enforcing the Hatch Act—the very agency whose "authoritative construction" the Government relies upon to save the Act from overbreadth. Yet that agency found, in its official deliberations, that the Act is overbroad.

The Government offered no rebuttal to the Letter Carriers' prima facie case that Section 9(a)'s political activity prohibition is overbroad and more restrictive

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[58] 1 CPA REPORT, *passim*, but particularly the alternative detailed statutory scheme recommended at 44-60.

than necessary to protect all identifiable public interests. The only finding that a court could make, on the record in this case, is that there are feasible and less restrictive alternatives to remedy all the abuses within the target area of Section 9(a)'s second sentence. Hence, the statute must fall.

IV. ONLY FACIAL INVALIDATION CAN REMEDY THE VAGUENESS AND OVERBREADTH OF THE HATCH ACT, EVEN AS CONSTRUED BY THE COMMISSION.

The Government's claim that invalidation of Section 9(a), on its face, is not warranted is predicated on the view that the statute "as construed" comprises the Commission regulations appearing at 5 C.F.R. Part 733 (Brief 58-59). The Government does not address itself to the propriety of striking down Section 9(a) if its validity needs to be considered apart from the Commission's "authoritative construction." Accordingly, we take as conceded the propriety of facial invalidation of Section 9(a) should this Court put aside or reject the Commission's construction,[54] and we turn to the question of why the Court cannot save parts of the political activity prohibition of Section 9(a) by selective reference to the Commission's construction.

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[54] It is clear that Section 9(a), unaided by the regulation, is invalid on its face. Any judicial attempt to winnow through the 3,000 prior determinations would involve the Court in the burdensome task of considering "the abstract question whether Congress might have enacted a valid statute." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964). Moreover, the complete absence of any "clear line" demarking protected from unprotected conduct makes judicial rewriting of Section 9(a) wholly inappropriate. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 862-63 (1970); *cf. Gooding* v. *Wilson*, *supra*, 405 U.S. 518, 528, 533 fn. (Burger, C.J., dissenting).

The vagueness and overbreadth of Section 9(a) inheres in the Commission's regulatory attempts at clarification and renders the regulation as invalid on its face as the statute itself. First, the Commission's 1970 regulation consistently cross-references Section 9(a):

> "All employees are free to engage in political activity to the widest extent *consistent* with the restrictions imposed by law *and* this subpart." 5 C.F.R. § 733.111(a).

Government workers are thus warned that the regulation's list of "do's" and "don't's" is not exhaustive and are referred back to underlying restrictions "imposed by law," *i.e.*, including the vague and overbroad Section 9(a). See also 5 C.F.R. § 733.111(a)(5), (a)(13) and 733.111(b). Further, the regulation's "including but not limited to" caveat which introduces the list of prohibited activities, 5 C.F.R. § 733.122(b), vitiates any claim of clarification and confirms the impression that the list of permitted and prohibited activity is illustrative only, not exhaustive or complete.

More importantly, the regulation preserves the overlap between categories of "permitted" activity and categories of "prohibited" activity that is inherent in the interplay between Section 9(a) and its statutory exceptions. Thus, "[s]oliciting votes in support of or in opposition to a partisan candidate for public office or political party office" is prohibited. 5 C.F.R. § 733.122(b)(7). A federal employee may, however, "express his opinion as an individual privately and publicly on political subjects and candidates." 5 C.F.R. 733.111(a)(7). As we have previously shown, the overlap of these conflicting permissions and prohibi-

tions renders the statute meaningless as a reasonable guide to action. The same is true of the regulation's fidelity to the statutory scheme.

In essence, the Government's position is that this Court should ratify, or remove, as it deems appropriate, the various prohibitions and permissions of the regulation. This view totally overlooks the confluent policies underlying both the "separation of powers" and "overbreadth" doctrines. The first requires that the body constitutionally responsible for legislation should legislate and limits the Court's role in construing a statute to effecting a clearly perceived, but inartfully expressed, legislative intent. But there is no basis for inferring such specific intent regarding each of the "laundry list" items in the regulation. Accordingly, the piecemeal construction which the Government seeks from this Court would produce a statute drafted by judges but never contemplated, considered or enacted by the Congress.

The function of the overbreath review complements the policy underlying the "separation of powers" doctrine. Such review insures that the legislature has in fact made the searching inquiries as to the need for regulating basic rights, and has identified compelling interests supporting each such restriction. Where it appears either that the legislature has made no such inquiry or that its inquiry has revealed only abuses controllable by narrower limitations, the overbroad statute must be invalidated on its face. Only in this manner will compelling interests be identified and legislatively precise responses be forthcoming. In short, Congress itself should be given the opportunity to legislate in this delicate area rather than be relegated to reviewing any attempted administrative or judicial patchwork rehabilitation.

CONCLUSION

For all the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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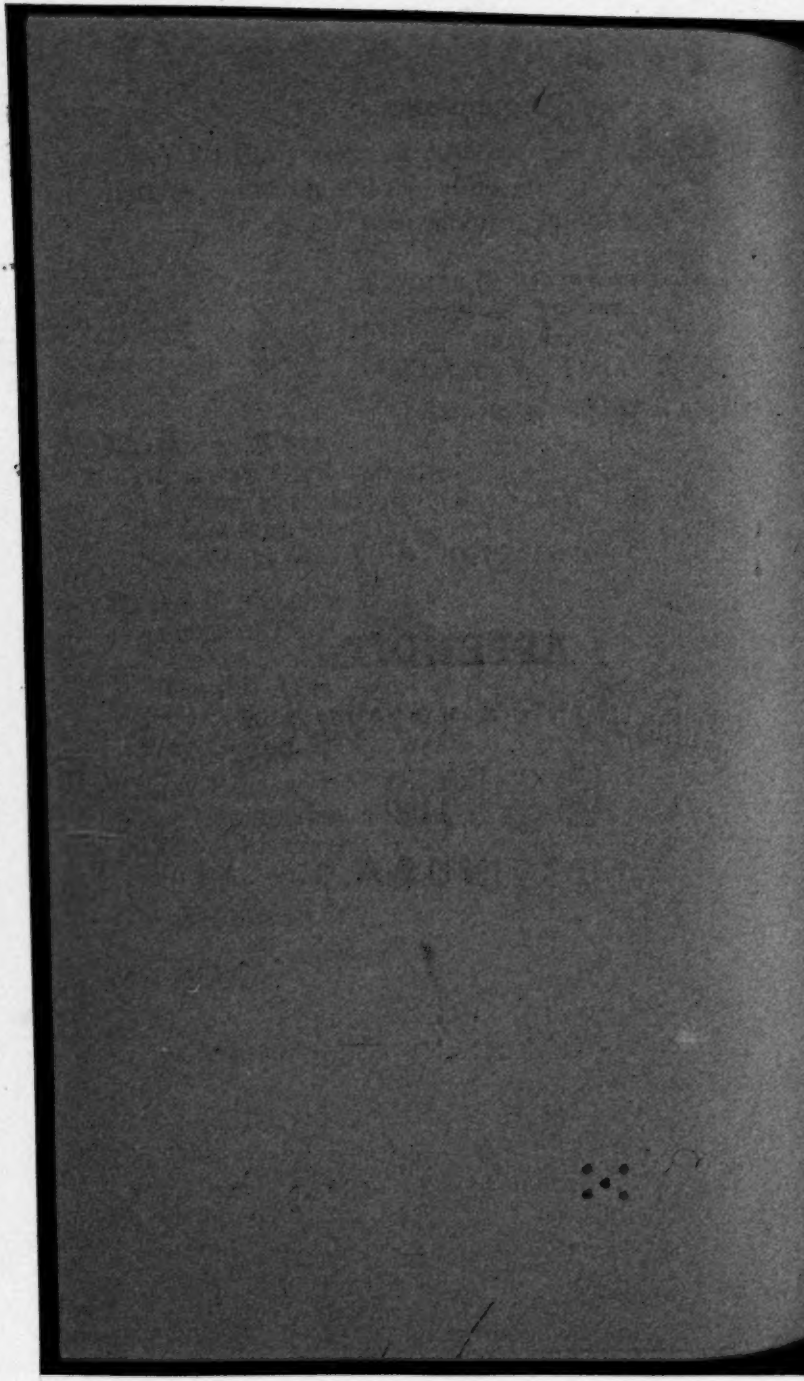
APPENDIX



APPENDIX

Introduction and Summary

The district court held unconstitutional the second sentence of Section 9(a) of the 1939 Hatch Act, now codified at 5 U.S.C. § 7324(a)(2), which prohibits federal employees from taking "an active part in political management or in political campaigns." That language was first used by Theodore Roosevelt in 1894 when he was a Civil Service Commissioner, but it then was only a suggestion. It was first made a *rule* by President Theodore Roosevelt in 1907 in Executive Order 642 which authorized that prohibition to be imposed upon federal employees in the "classified services." That order represented a radical departure from all previous civil service reform efforts, and its only statutory authority was a very general provision impliedly permitting the President to prescribe rules for the "classified" civil service.[1]

This appendix contains two parts: the first reviews pre-1907 proposals for congressional and executive control of political activity by federal employees; the second outlines the legislative history of the 1939 statute. Considered together, these two studies show that the legislative, as contrasted to the executive, branch of the Federal Government has never determined, explicitly or implicitly, that a blanket prohibition on voluntary, partisan activity, such as that here held infirm, is needed to protect

[1] Section 2(1) of the Civil Service Act of 1883, ch. 27, 22 Stat. 403; the pertinent provision is now codified at 5 U.S.C. §§ 1301, 3302 (1970). The order also recited as its authority an 1871 statute that predated the competitive civil service and empowered the President to ". . . establish regulations for the conduct of persons who may receive appointments in the civil service." Act of March 3, 1871, ch. 114, § 9, 16 Stat. 514.

either the integrity and neutrality of the federal civil service merit system or the integrity of the political process.

Instead, primary historical sources reveal:

(a) From the very first Congress in 1791, until 1939, the legislature refused to impose restraints on voluntary political activities of federal employees in the face of strong arguments that such impairments were unconstitutional.

(b) When Theodore Roosevelt served as a Civil Service Commissioner, he became frustrated by the obstacles to efficient conduct of government business that arose from a high proportion of federal employees being outside the civil service system, a condition that no longer prevails.

(c) When Roosevelt became President, he reacted to his earlier frustrations, ignored the constitutional objections that had prevailed for the previous century, and imposed a broad, sweeping ban on political activity by *classified* employees.

A. Public Employees and Political Activity Prior to Promulgation of Civil Service Rule I in 1907.*

During the century and a half preceding passage of the Hatch Act, various attempts were made by legislation and executive decree to limit the role which a federal officeholder could play in partisan politics. Throughout this period, opponents of the attempted restrictions successfully raised constitutional arguments against circumscribing the political activities of federal employees. This opposition was responsible for the defeat of nineteenth century legislative attempts to proscribe voluntary partisan political activity. Until President Roosevelt acted, public employees were generally free to engage in voluntary, partisan political activity, though forbidden to use official authority or influence to interfere with an election or to

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* Section A of the Appendix was written by Judith Hetherton, a third-year student at Georgetown University Law Center.

coerce the political behavior of other public employees or of beneficiaries of government programs.

The First Congress

Restrictions on political activities of federal officeholders were proposed as early as 1791. During the Second Session of the First Congress, Representative James Jackson introduced an amendment to a bill to levy an excise tax on distilled spirits which would have "prevent[ed] Inspectors, or any officers under them, from interfering, either directly or indirectly, in elections, further than giving their own votes, on penalty of forfeiting their offices."[2] Jackson's proposal gave rise to a debate on the constitutional problems inherent in any such restriction. Representative Vining of Delaware declared that it would "disfranchise a great number of citizens of the rights of suffrage."[3] Vining argued that it was "unconstitutional, as it will deprive them of speaking and writing their minds; a right of which no law can divest them."[4] To the assertion that the proposal was based on an English law passed in the reign of William and Mary, Representative Fisher Ames objected that "the circumstances of this country and Great Britain were not similar", and "this clause will muzzle the mouths of freemen, and take away the use of their reason."[5] The amendment was defeated 37 to 21.[6]

Jefferson's Administration

We have discovered no further legislative attempts to control the voluntary political activity of federal officeholders for almost fifty years after the first Congress.

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[2] 2 ANNALS OF CONG. 1876 (1791). Citation to the early legislative attempts to curb political activities of federal officeholders was found in Fowler, *Precursors of the Hatch Act*, 47 MISS. VALLEY HIST. REV. 247 (1960).

[3] 2 ANNALS OF CONG. 1876 (1791).

[4] *Ibid.*

[5] *Id.* at 1877.

[6] *Id.* at 1878.

During Jefferson's administration, restrictions were proposed by the Administration but, contrary to the Government's assertion (Brief, 65), apparently were not carried out. In July of 1801, Secretary of the Treasury Albert Gallatin wrote President Jefferson concerning a "rough draft of a circular to the collectors" he had prepared, and asked Jefferson whether the time was right for its release. The proposed circular, in the words of Gallatin, declared:

> "[w]hilst freedom of opinion and freedom of suffrage at public elections are considered by the President as imprescriptible rights, which possessing as citizens, you cannot have lost by becoming public officers, he will regard any exercise of official influence to restrain or control the same rights in others as injurious to that part of the public administration which is confided to your care . . . ."[7]

The circular was not aimed at voluntary, partisan political activity, but rather at the use by a federal employee of his office to interfere with the rights of others. Jefferson replied that he approved of Gallatin's draft, and had himself "proposed very early to issue a proclamation [on electioneering activity], *but was restrained by some particular considerations.*"[8] He suggested that Gallatin send out the circular "whenever . . . you shall think the public mind in

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[7] Letter of Albert Gallatin to Thomas Jefferson, July 25, 1801, in 1 H. ADAMS (ed.), THE WRITINGS OF ALBERT GALLATIN 28-29 (1879) (hereinafter cited as WRITINGS OF GALLATIN).

[8] Letter of Thomas Jefferson to Albert Gallatin, July 26, 1801, in 1 WRITINGS OF GALLATIN 29-30 (Emphasis added). The "particular considerations" to which Jefferson probably referred arose from a remonstrance by citizens of New Haven, Connecticut, against his removal of the customs collector appointed by President Adams about a week before Jefferson's inauguration. See C. FISH, THE CIVIL SERVICE AND THE PATRONAGE 32-38, 43-44 (1904) (hereinafter cited as FISH).

a proper state for this reformation . . . ."[9] Gallatin's letter to Jefferson of September 18, 1804, makes it clear that the circular was never released.[10]

Thus, the report in NILES' WEEKLY REGISTER of December 18, 1830,[11] more than twenty years after Jefferson left office, that such a circular was issued during the presidency of Thomas Jefferson, is of doubtful validity.[12] Furthermore, the notation in the Appendix to RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, published in 1899, that the circular described in NILES' WEEKLY was issued shortly after Jefferson's inauguration, is certainly erroneous, since Jefferson, himself, noted in July of 1801 that his plan to do so had been "restrained by some particular considerations."[13]

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[9] 1 WRITINGS OF GALLATIN 30.

[10] "I have uniformly been of opinion that, as it related to the principles of our government and to the reputation and popularity of the Administration, it was of importance that the officers of the federal government should abstain from any interference with public elections; and I had, as you may recollect, prepared a paragraph to that effect in my first circular to the collectors, *which you, as well as Mr. Madison, thought premature, and the subject has not been attended to since that time.*" Letter of Albert Gallatin to Thomas Jefferson, September 18, 1804, in 1 WRITINGS OF GALLATIN 209 (Emphasis added.); see FISH 44: "The circular was never sent."

[11] 39 NILES' WEEKLY REGISTER 274 (December 18, 1830).

[12] Fowler, *Precursors of the Hatch Act, supra* note 2, at 249.

[13] See note 8, *supra*. Richardson extracted the "circular" printed in his compilation from a speech delivered by Senator W. C. Rives in the Senate on February 12, 1839; he noted that "the originals could not be found." 10 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, APPENDIX 98 (1899). When Rives gave his speech, he did not indicate the source of the "circular." CONG. GLOBE, 25th Cong., 3d Sess. Appendix, 405 (1839). Representative Edward Stanly of North Carolina quoted the "circular" in the House on August 31, 1850. He erroneously cited his source as Volume 29 of NILES' REGISTER, rather than volume 39. CONG. GLOBE, 31st Cong., 1st Sess., Appendix, 1255 (1850).

The Crittenden Bill

In January of 1837, at the beginning of Van Buren's administration, Representative John Bell of Tennessee, an opposition Whig, introduced a bill to prevent the interference of officers of the United States government in elections, and termed it "a bill to secure the freedom of elections."[14] The Twenty-fourth Congress adjourned without taking action on the bill, and Bell reintroduced it in the next Congress.[15] Meanwhile, John J. Crittenden of Kentucky introduced a similar bill in the Senate.[16] The Senate Judiciary Committee, however, returned an adverse report on the Crittenden bill, calling it "unjust, unequal, impractical, impolitic, tyrannical, and unconstitutional,"[17] for every citizen had the " 'right of freely examining public characters and measures, and of free communion among the people thereon,' 'by word, message, or writing,' or in any other manner he may judge proper."[18] The debate on the Crittenden bill lasted for two weeks. In general, Democrats opposed the bill and most of the support came from the Whigs (the party out of power). John C. Calhoun argued that the bill was unconstitutional as an unlawful federal restraint on the right of suffrage, declaring that "a citizen does not cease to be one in becoming a Federal officer."[19] James Buchanan of Pennsylvania declared that

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[14] CONG. GLOBE, 24th Cong., 2d Sess. 77, 105, 111, 122, 124, 127, 144, 146; Appendix 291-96, 316-18 (1837).

[15] CONG. GLOBE, 25th Cong., 2d Sess. 190, 209 (1838).

[16] *Id.*, 3d Sess. 58-59, 179, 226 (1838-39).

[17] *Id.*, Appendix, at 160 (1839).

[18] *Id.*, Appendix, at 157.

[19] *Id.*, Appendix, at 234. Senator Calhoun went on to say:

"That a bill, containing such broad and indiscriminate provisions, transcends the powers of Congress, and violates in the officer the electoral rights of the citizen, held under the authority of his State, and guarantied [sic] by the provision of the Constitution which secures the freedom of speech to all, is too clear, after what has been said, to require additional illustration. It cannot pass without the [sic] enlarging the power of the Government by the abridgment of the rights of the citizen."

the bill was worse than the sedition law and called it a "gag law" which would clearly violate the First Amendment by interfering with freedom of speech and of the press.[20] The bill was defeated by a vote of 28 to 5.[21]

The bills were reintroduced by Crittenden and Bell in the Twenty-sixth Congress. In the Senate, the bill was not even debated,[22] and in the House it was defeated by a vote of 108 to 53.[23] When the Whigs assumed power in 1840 with the election of William Henry Harrison, Bell and Crittenden became members of his Cabinet, and any serious struggle for such legislation ceased.[24]

Webster's Circular

In his inaugural address, President Harrison expressed concern over the possible use of the appointing power to "control the whole revenues of the country" and to control "the freedom of the elective franchise," especially by the public officers themselves.[25] Accordingly, on March 20, 1841, Secretary of State Daniel Webster issued a circular to all department heads proscribing, under penalty of removal, "partisan interference in popular elections" and political assessments, so that "while the exercise of the elective franchise by the people shall be free from *undue* influences of *official* station and authority, opinion shall also be free among the officers and agents of the Government."[26] Webster's Circular did *not* proscribe voluntary, partisan political activity but was aimed only at use of official authority to manipulate public employees. Harrison died just

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[20] *Id.*, Appendix, at 203-10.

[21] *Id.* at 226.

[22] CONG. GLOBE, 26th Cong., 1st Sess. 116 (1840).

[23] *Id.* at 406. For debates on the bill in the House, see *id.* at 178, 300; Appendix, 369-77, 510-15, 635-38, 707-12, 829-35.

[24] Fowler, *Precursors, supra* note 2, at 253.

[25] 4 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 12-13 (1897).

[26] *Id.* at 52 (Emphasis added.)

two weeks after this circular was issued, and there were few other efforts at mid-century to curb the political activity of officeholders, despite official repetition of the view from time to time.[27]

Hayes' Administration

In June of 1877, the newly-elected President Hayes released what became a highly controversial Executive Order providing that "no officer should be required or permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns."[28] Hayes' Executive Order was taken word for word from a letter he had sent the Secretary of the Treasury a month earlier in regard to the investigation of the New York Customs House.[29] It has been suggested that President Hayes' order was a step in his efforts "to oust Chester A. Arthur and Alonzo B. Cornell from the New York custom house which they had turned into a political machine of the most corrupt and disreputable character."[30] The eminent historians, Samuel Eliot Morison and Henry Steele Commager, describe Arthur, later President, as a "machine politician of New York, long a satellite of the lordly [Roscoe] Conkling . . . ."[31] In any event, the 1877

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[27] L. D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861, at 338 (1963); FISH, 158: "The period from 1845 to 1865 marks the apogee of the spoils system in the United States: . . . the victors divided the spoils and were unashamed."

[28] 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 450-51 (1898).

[29] Letter of President Hayes to John Sherman, Secretary of the Treasury, May 26, 1877, in 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 450 (1898).

[30] 2 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 220 (4th ed. 1954); see A. HOOGENBOOM, OUTLAWING THE SPOILS 151-78 (1961).

[31] 2 MORISON & COMMAGER, *op. cit. supra*, at 222.

order was aimed at "the kind of political activity which used a large federal establishment as a source of political power," coercing public employees to work for the party and contribute money for the maintenance of the political machine,[32] not at voluntary, partisan political activity.

The order caused great "consternation" among the federal officeholders Hayes had installed in the Post Office Department, and the Postmaster General was "flooded with inquiries as to the extent of this order."[33] Some leniency was used in its interpretation. Where officeholders had been elected as delegates to state conventions before the order was published, they were permitted to retain their positions. Although it was eventually decided that federal officeholders who were members of the national committee must choose between their two jobs, President Hayes apparently had thought, at first, that this would be unnecessary "since their political activities took comparatively little of their time."[34] This concern with the amount of time taken up by political activity seems to conflict with the idea that Hayes' order was intended to force political sterility upon federal officeholders.

President Hayes was later severely criticized by President Garfield for taking this step through executive order, "trying to effect a reform without legislative aid."[35] Garfield complained that the order forbidding federal officeholders to participate in caucuses and conventions interfered with "the lawful right of citizens," and declared

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[32] Loeb, *Public Employees and Political Activity: New Realities Require Fresh Approaches,* in 3 CPA REPORT, 210 (1968).

[33] D. FOWLER, THE CABINET POLITICIAN: THE POSTMASTERS GENERAL, 1829-1909, at 170 (1943).

[34] *Ibid.*

[35] Letter of James A. Garfield to Burke A. Hinsdale, July 25, 1880, Garfield Letter Book, James A. Garfield Papers (Manuscript Division, Library of Congress).

that, if elected President, he would ask Congress to pass a law, but only to *protect* federal officeholders from removal for political reasons.[36]

The Pendleton Act

This was accomplished under President Garfield's successor, Chester A. Arthur, by the passage of the Pendleton Civil Service Act of 1883.[37] The Act, primarily concerned with the establishment of the Civil Service Commission and *protection* of federal officeholders, did not prohibit public employees' engaging voluntarily in political activity. It prohibited only the use of official authority to coerce the political action of any person, the levying of political assessments on federal officeholders, and the solicitation of political contributions in federal buildings. Senator Pendleton called the initial legislation "a tentative effort . . . an experiment" not expected to affect more than 10% or 10,000 government employees—the clerks in the larger federal offices.[38] The Senate report on the bill made it clear that "citizens when they become office-holders do not cease to be citizens, or lose any of the rights or avoid any of the responsibilities of citizenship." [39]

The House did not even debate the bill,[40] and a leading scholar of the civil service reform movement has called the Senate debates "entirely unworthy of the occasion, hardly touching any of the serious considerations involved . . . ." [41] The Senate debates assumed a highly partisan character, with the opposition coming from the Democrats who had

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[36] *Ibid.*

[37] Act of January 16, 1883, ch. 27, 22 Stat. 403.

[38] 14 CONG. REC. 206 (December 12, 1882).

[39] S. REP. No. 576, 47th Cong., 1st Sess. xii (1882).

[40] 14 CONG. REC. 860-67 (January 4, 1883).

[41] FISH, 218.

been out of power for twenty-two years and feared that the new legislation would give life tenure to Republican appointees. The only mention of the bill's effect on the voluntary, partisan political activity of officeholders was made by Senator Brown of Georgia, a Democrat. He pointed out that the legislation allowed federal employees within its scope to "be as active as they choose."[42] There was a great deal of discussion of the possibility of prohibiting not only the solicitation, but also the giving of political contributions by federal employees.[43] Such a prohibition was objected to as an unconstitutional restriction, however, and all amendments proposing such prohibition were rejected.[44]

The first two rules promulgated by the Civil Service Commission under the Act were directed at interference with elections and coercion of employees in the public service for political party purposes.[45] In its first report, the Commission explained: "the first assert[s] the right of the private citizen to freedom from the coercion of executive officers, and the second . . . the right of such officers to freedom from the coercion of parties and factions."[46] This would leave public employees free to "discharge those political duties and co-operate in manly and honest ways within their party, as becomes every citizen of a republic."[47]

In an early construction of the Pendleton Act, Postmaster General Walter Q. Gresham found that he could

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[42] 14 CONG. REC. 277 (December 14, 1882).

[43] *Id.* at 621-30 (December 23, 1882), 635-44 (December 27, 1882).

[44] *Id.* at 630, 642, 643.

[45] FIRST ANN. REP. OF THE CIVIL SERVICE COMM'N 45 (1884).

[46] *Id.* at 8.

[47] *Id.* at 31.

advise his postmasters that they would now be free to serve on political committees, as long as these committees did not receive contributions from federal officeholders.[48]

The first civil service rules promulgated by the President under the Act provided for three classified services: departmental, customs, and postal.[49] The classified services, the only parts of the executive civil service over which the Civil Service Commission exercised any authority, included, as of July 1, 1883, only about 10.5% of the executive civil service, or 13,780 positions out of a total of 131,208 positions.[50]

In 1886 the force of the Commission's rules was superseded by a new definition of the effect of the Pendleton Act on the political activities of officeholders in the form of a circular issued by President Cleveland to heads of departments.[51] The 1886 circular permitted officeholders wider participation in political activities than had President Hayes' circular of 1877, because President Cleveland made it clear that he was not issuing a blanket condemnation of

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[48] Letter of Walter Q. Gresham to W. H. Hart, August 8, 1884, Walter Q. Gresham Papers (Manuscript Division, Library of Congress).

[49] FIRST ANN. REP. OF THE CIVIL SERVICE COMM'N 45-46 (1884). The term "classified service" is generally used to refer to that portion of civil service positions wherein removal for political reasons is forbidden. P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 99 n. 6, 207 (1958).

[50] CIVIL SERVICE COMMISSION, THE CLASSIFIED EXECUTIVE CIVIL SERVICE OF THE UNITED STATES GOVERNMENT, at 4 (1932) (in the Civil Service Commission's Archives Collection). See also BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 710 (1957). All federal employment statistics for the period before World War I "are at best approximate and can be safely used only to show a general trend." VAN RIPER, *op. cit. supra* note 49, at 203 n. 86.

[51] 8 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 494-95 (1898).

political activity but rather he was aiming at "the use of their *official* positions in attempts to control political movements in their localities." [52] This idea was repeated many times in the letter, with President Cleveland referring to "official positions," "official duty," "official place," "official coercion," and it was clearly spelled out in the following paragraph:

> "Individual interest and *activity* in political affairs are by no means condemned. Officeholders are neither disfranchised nor forbidden the exercise of political privileges, *but their privileges are not enlarged nor is their duty to party increased* to pernicious activity by officeholding." [53]

The Cleveland circular became the basic rule governing the political activities of federal officeholders until the issuance by President Theodore Roosevelt in 1907 of Civil Service Rule I, the immediate predecessor of the Hatch Act.

Roosevelt's Rule

On June 3, 1907, President Theodore Roosevelt issued Executive Order No. 642 pursuant to his somewhat vaguely expressed statutory authority [54] to prescribe rules for the classified civil service.[55] The Executive Order was incorporated in Civil Service Rule I on June 15, 1907.

The 1907 Rule I was a radical departure from previous approaches taken by the Congress, the Presidents, or the Commission. It prohibited all persons in the classified service from taking an "active part in political manage-

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[52] *Ibid.* (Emphasis added.)

[53] *Ibid.* (Emphasis added.)

[54] Act of January 16, 1883, ch. 27, § 2(1), 22 Stat. 403, now codified at 5 U.S.C. §§ 1301, 3302 (1970). See 1a, n. 1, *supra.*

[55] TWENTY-FOURTH ANN. REP. OF THE CIVIL SERVICE COMM'N 104 (1907).

ment or in political campaigns."[56] The only qualification was that the prohibition was restricted to the classified service, which in 1907 consisted of approximately 196,918 government employees.[57] Promulgation of this Rule "shifted the emphasis from the dangers of coercion from above to a policy of enforcing neutrality at the lower levels of the public service."[58] Not before Roosevelt's time had the Commission acted to proscribe voluntary, partisan political activity.[59] Why, after more than 100

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[56] *Id.* at 55, 104.

[57] *Id.* at 1-2. This represented approximately 58% of the estimated 337,000 employees in the federal service in 1907. *Ibid.*

[58] Loeb, *Public Employees*, 3 CPA REPORT, 211.

[59] Volume I of the Civil Service Commission's *Political Activity Reporter* contains a subject-matter index of decisions by the Commission since 1883, listing 64 categories of proscribed or questionable political activity. Eight of these categories concern unquestionably proscribed activity such as coercion of federal employees, levying of political assessments, solicitation of political contributions, discrimination in employment for political reasons. Of the remaining 56 categories, 30 contain no pre-1907 decisions. The remaining 26 categories contain a total of 36 decisions. An analysis of these 36 cases shows that in 29 cases the Commission either took no action or was concerned with multiple violations including at least one of the obviously proscribed activities listed above. Of the seven remaining cases, six involved alleged violations of President Roosevelt's 1902 letter (*infra*, pp. 17a-18a) the predecessor of his 1907 Rule. Only one case could be found that, prior to 1902, condemned voluntary partisan political activity, and that case involved a secretary of the customs board of civil service examiners. Index # 18, *Selleck*, 15 AR 264 (1898). He had served on a committee in a Republican county convention and had been appointed a delegate to other political conventions. When Selleck's attention was called to a Commission guideline forbidding such activity by members of its board of examiners, he chose to resign his Commission position in order to continue his political activity.

years of government service without such a restriction, was all voluntary partisan political activity then circumscribed? Perhaps the answer can best be found in the experiences of the man who promulgated the Rule.

Theodore Roosevelt had served as Civil Service Commissioner from 1889 to 1895. In the Eleventh Report of the Commission, for the fiscal year 1894, he authored a paragraph entitled "Offensive Partisanship" setting forth his views on political activity of officeholders, while admitting that "no rule about what is deemed proper partisanship in the classified service has ever been authoritatively construed, and the Commission has no power whatever to construe such a rule." [60] Roosevelt went on to state what his idea of such a rule would be.

> "A man in the *classified* service has an entire right to vote as he pleases, and to express privately his opinions on all political subjects; but he should not take any active part in political management or in political campaigns . . . ." [61]

The proscription contained in the last phrase is identical to that of the 1907 Rule and of the 1939 statute. The purpose of the suggested rule was the same as that of all previous guides to political behavior of officeholders: to prevent a federal officeholder "from turning his official position to the benefit of one of the parties into which [the] whole public is divided . . . ." [62] But the blanket proscription was as new as the thought that "in no other way can this [use of official position to benefit a party] be prevented." [63] The only explanation for this broad prohibition of political activity

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[60] ELEVENTH ANN. REP. OF THE CIVIL SERVICE COMM'N 20-21 (1894).

[61] *Ibid.* (Emphasis added.)

[62] *Ibid.*

[63] *Ibid.*

by federal officeholders was Roosevelt's statement that it was necessary "for precisely the same reasons that a judge, an army officer, a regular soldier, or a policeman is debarred from taking such active part" [64] in political management or campaigns.

When Theodore Roosevelt wrote that paragraph, he had served on the Civil Service Commission for five years. A study of his experience on the Commission, along with his writings, might, therefore, be expected to provide some insight into his reasons for believing in the necessity of such a broad proscription.

While Roosevelt was Commissioner, no more than 25% or approximately 45,000 of those in the civil service were in the classified service and thus subject to the enforcement jurisdiction of the Commission.[65] As Commissioner, much of his time had been spent investigating cases and making recommendations which department heads ignored, and shortly after completing his service on the Commission, Roosevelt expressed frustration with this lack of enforcement authority.[66]

In his *Autobiography,* Roosevelt condemned the evils of patronage and the spoils system. One of his major concerns was "the lack of continuous [political] activity on the part of . . . good citizens" which went hand-in-hand with the "ever-present activity of those who have only an evil self-interest in political life." [67] Roosevelt felt that since the spoils system had "become habitual and traditional in American life . . . [and] ingrained in the mind of the average American," it was necessary, in order to uproot the system "gradually to change the average citi-

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[64] *Ibid.*

[65] According to the CLASSIFIED EXECUTIVE CIVIL SERVICE, *supra* note 50, at 33, there were approximately 180,000 positions in the executive civil service in 1894. Of these, only 45,821, or 25.5% were positions subject to examination.

[66] See T. ROOSEVELT, ADMINISTRATION—CIVIL SERVICE 8-9 (1897).

[67] T. ROOSEVELT, AUTOBIOGRAPHY 147 (1919).

zen's mental attitude toward the question . . . ." [68] Roosevelt apparently felt this change in attitude could be accomplished only by disassociating federal officeholders entirely from active politics:

> ". . . we ought to make it clear as a bell that the business of serving the people in one of the ordinary ministerial Government positions, which have nothing to do with deciding the policy of the Government, should have no *necessary* connection with the management of primaries, of caucuses, and of nominating conventions." [69]

Roosevelt's approach of complete severance was, therefore, designed to meet the peculiar situation in the history of civil service reform at the turn of the century when the spoils system still controlled placement in 75% of federal offices.

But even Roosevelt saw the difficulty in applying any hard-and-fast rule to the entire civil service as contrasted to its classified part. In a letter to the Commission written in 1902 during his first term as President he noted:

> "After 16 years' experience [in interpreting Cleveland's 1886 circular] it has been found impossible to formulate in precise language any general construction which shall not work either absurdity or injustice. Each case must be decided on its merits. For instance, it is obviously unwise to apply the same rule to the head of a big city Federal office, who may by his actions coerce hundreds of employees, as to a fourth-class postmaster in a small village who has no employees to coerce, and who simply wishes to continue to act with reference to his neighbors as he always has acted." [70]

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[68] *Id.* at 145-46.

[69] *Id.* at 148 (Emphasis added.)

[70] TWENTIETH ANN. REP. OF THE CIVIL SERVICE COMM'N 125 (1903).

Roosevelt's solution was to distinguish between officeholders in the classified service, and those in the unclassified service.

> "After my experience under two Presidents . . . I had become convinced that it was undesirable and impossible to lay down a rule for public officers not in the classified service which should limit their political activity as strictly as we could rightly and properly limit the activity of those in whose choice and retention the element of political considerations did not enter . . . ." [71]

The irony of this approach was, of course, that the restricted employees in the classified service comprised only about 50% of federal officeholders at that time, and by 1908 encompassed the "fourth-class postmaster in a small village who has no employees to coerce" but generally *not* the "head of a big city Federal office, who may by his actions coerce hundreds of employees . . . ." [72]

But ironical or not, Theodore Roosevelt's blanket prohibition on political activity of government employees became law, first by executive fiat, and then thirty-two years later by congressional action taken without examination or consideration of the underlying premises.

B. The Legislative History of the Hatch Act of August 2, 1939

The Sheppard Committee Report

The Hatch Act arose from events surrounding various elections in 1936 and 1938. From around the country came charges that Federal relief funds were being used by officials to influence elections. With an eye toward remedial legislation, the Senate established, May 27, 1938, a special

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[71] *Ibid.*

[72] *Ibid.* The first step toward inclusion of fourth-class postmasters was taken on November 30, 1908, when the positions of fourth-class postmasters in the Northern and Eastern states were made competitive. TWENTY-FIFTH ANN. REP. OF THE CIVIL SERVICE COMM'N 126 (1908).

five-member bi-partisan committee to investigate the charges.[73] The Senate subsequently expanded the authority of the Committee to consider all possible inappropriate political acts by officials.[74] This Committee, chaired by Senator Morris Sheppard of Texas, published its extensive findings on January 3, 1939.[75] The Sheppard Committee Report constituted the only investigation or fact finding underlying the Hatch Act.

The Sheppard Committee Report consists of two parts: Part I, 65 pages long, contains a summary of findings and legislative recommendations; Part II, 378 pages long, sets out summaries of case investigations.

The substance of the Committee's Report can be summarized by its classification of the hundreds of complaints it had received:

> "(1) Irregularities in registration and voting; (2) abuse of the Senate franking privilege; (3) excessive expenditures and unreported expenditures; (4) solicitation or assessment of Federal officials and employees either by Federal officials and employees or others for contributions in behalf of a senatorial candidate; (5) solicitation or assessment of State officials and employees receiving any part of their pay from money appropriated by Congress for such contributions; (6) intimidation or coercion by Federal officials and employees or others in behalf of a senatorial candidate; (7) use of funds appropriated by Congress in behalf of a senatorial candidate; and (8) promising of employment in private industry in exchange for the promise to vote for certain candidates." [76]

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[73] S. Res. 283, 75th Congress, 3d Sess. (1938).

[74] S. Res. 290, 75th Congress, 3d Sess. (1938).

[75] *Investigation of Senatorial Campaign Expenditures and Use of Governmental Funds: Report of the Special Committee to Investigate Senatorial Campaign Expenditures and Use of Governmental Funds in 1938*, S. REP. No. 1, 76th Cong., 1st Sess. (1939) (Hereinafter cited as the Sheppard Committee Report).

[76] Sheppard Committee Report, Pt. I, pp. 3-4.

It is most striking that the Sheppard Committee Report contained not one finding that the effectiveness of the federal work force was being compromised by voluntary, partisan activity by its employees. No category relates to problems arising from the freedom of government employees not subject to Civil Service Rule I to engage voluntarily in partisan political activity.

Yet, the Report's summary of cases investigated shows that the Sheppard Committee did consider instances of voluntary, partisan activity by such employees. In every such instance that we have found, the Committee closed the investigation with the determination that such activity did not constitute grounds for criticism.[77]

The ultimate finding of the Sheppard Committee Report related to the impact of various "New Deal" relief programs on the federal election process. These programs had vastly increased the number of federal employees and recipients of government benefits. Projects such as the WPA and CCC were designed to put needy persons on the public payroll, but these employees were not members of the classified or competitive civil service and thus were not governed by Civil Service Commission Rule I and its manifold determinations prohibiting partisan political activity. The common feature of the abuses uncovered by the Sheppard Committee was coercion or intimidation by government officials of employees or relief recipients to change party affiliation or to support party interests. When such coerced partisan support took financial form, taxpayers' money was thereby channeled into partisan political activity away from relief of the needy, and the political process was thus corrupted. The Committee found "that funds appropriated by Congress for the relief of those in

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[77] *Alleged W.P.A. Political Activity in Owen County, Indiana*, Sheppard Committee Report, Pt. II, p. 47; *Gilbert A. Dailey, id.* at 111; *Frank S. Revell, id.* at 134.

need and distress have been in many instances diverted from these high purposes to political ends." [78]

Consonant with these findings, the Sheppard Committee recommended a number of amendments to Title 18 of the United States Code to make such practices subject to criminal penalties. The Sheppard Committee recommendations are narrowly drawn and precisely directed at the evils discovered. Most significantly, they include *no* recommendation or finding that prohibition of any voluntary partisan political activity is needed to protect the integrity of the civil service or the political process.

Senate Passage of the Hatch Act

Less than two months after the Sheppard Committee Report was filed, Senators Sheppard, Hatch, and Austin jointly introduced S. 1871, "an Act to prevent pernicious political activities." [79] Ten days after its introduction, and without hearings, the Committee on Privileges and Elections sent the bill to the Floor accompanied by a two-page report recommending enactment.[80] The entire discussion of Section 9 in the two-page Committee report follows:

> "Section 9 is a restatement of the law now in effect as regards civil-service employees. It provides in almost the exact language of the civil-service rule that it shall be unlawful for any person employed in any administrative or supervisory capacity of any agency of the federal government to use his official authority for purpose of interfering with an election or affecting the result thereof.
>
> "In effect, this is also a restatement of the provisions of section 2 of the act, except it includes an additional

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[78] Sheppard Committee Report, Pt. I, p. 39.

[79] 84 CONG. REC. 2935 (1939).

[80] S. REP. No. 221, 76th Cong., 1st Sess. (1939).

> penalty—that of removal from the position or office held by him. It also prohibits such persons from taking active part in political management or in political campaigns just as the civil-service Rules now provide."[81]

When the bill reached the Senate floor on April 13, 1939, it was passed by unanimous consent after a few amendments not pertinent to the issues raised by this case.[82] Thus, up to the time that the Hatch Act passed the Senate, there was no consideration for prohibiting voluntary, partisan, but non-coercive political activity.

The Senate bill was referred to the House Committee on the Judiciary. That Committee held no hearings but, on July 5, 1939, reported the bill out favorably with amendments, describing its purpose as follows:

> "This proposed legislation prohibits interference with the right of every person to vote as he may choose at elections for federal offices, including the office of presidential elector."[83]

Consistent with this objective, the House Committee deleted Section 9's prohibition against voluntary, partisan activity by administrative or supervisory personnel, saying:

> "Section 9 forbids any person in any administrative or supervisory capacity by the federal government to use his official authority or influence for the purpose of

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[81] *Id.*, at 2.

[82] 84 CONG. REC. 4191-92; the principal amendments removed primary elections from the reach of the bill, apparently because of doubts as to the constitutional power of the Congress to regulate such elections. *Cf. United States* v. *Gradwell*, 243 U.S. 476 (1917).

[83] H.R. REP. No. 1028, 76th Cong., 1st Sess. 1 (1939).

interfering with an election or affecting the results thereof, upon pain of removal from his office. The Committee amendment strikes out the provision that such persons shall take no active part in political management or political campaign. *This provision of the Senate Bill is very far-reaching and contains no exceptions.*" [84] (Emphasis added.)

Thus, the first time any committee of Congress explicitly considered whether it was necessary to restrict voluntary, partisan activity, it rejected such a restriction as too "far-reaching," even though limited to administrative or supervisory personnel. The only point of agreement on Section 9 between the House and the Senate was that the remaining prohibitions of Section 9—as to misuse of official authority and influence—should apply only to administrative or supervisory personnel.

At first, the House, over opposition led chiefly by Representatives Hobbs of Alabama and Adler of New York, rejected its Judiciary Committee's proposed deletion of the ban against the voluntary, partisan activity.[85] This left intact the Senate version of Section 9, with its limited ban on voluntary, partisan activity by administrative or supervisory personnel.

Representative Hobbs then offered an amendment to strike the ban against voluntary, partisan activity by administrators or supervisors.[86] The House adopted Rep. Hobbs' amendment by a nearly unanimous vote.[87] This eliminated any ban on voluntary, partisan activity.

Representative Dempsey then offered a substitute amendment for Section 9 which retained the prohibition against

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[84] *Id.* at 2.

[85] 84 CONG. REC. 9621.

[86] *Id.* at 9622.

[87] *Id.* at 9625.

partisan political activity and extended its application to *all* officers or employees of the executive except the President, Vice President, his staff, and certain other senior policy officers.[88] This amendment was enacted into law after further parliamentary maneuvering. First, Hobbs sought to protect his previous, successful amendment by proposing to delete the Dempsey amendment's prohibition of partisan political activity, contending that such a restriction of protected freedoms was not necessary to achieve the Act's legitimate goals:

> "Mr. Hobbs. Every single solitary pernicious activity is interdicted by the term of this bill. Every abuse of power, bribery, coercion, threats, intimidation, solicitation of funds from relief workers, or from anybody on relief, every exercise of official authority or influence, all of those things you cry out against are interdicted by this bill already. But when you come to this section of the bill you say that no matter how honestly a Federal officeholder in his supervisory or administrative capacity may conduct himself, no matter how clean his hands may be, he cannot participate in political management or campaigns. No matter how scrupulously he may avoid any abuse of his rights of free speech and liberty of action guaranteed by the Constitution. If you do this thing, you not only violate the Constitution, you not only violate every natural right of every citizen in the United States, but by doing this you divest him of citizenship and you have set up the process of disintegration, whereby the Government 'of the people, by the people, and for the people' will have begun to perish from the earth.
>
> "I beg of you that you leave it not only to the penal provisions under this act, but also to the pains and penalties of the Corrupt Practices Act, to curb abuses

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[88] *Ibid.*

of the types feared, and not deny the fundamental rights of American citizens. [Applause]." [89]

When Representative Dempsey defended his amendment he failed to suggest a single vice not already amply covered by the bill's anti-coercion and intimidation provisions:

"MR. DEMPSEY. Do you want people who have been indicted, threatened, and coerced, as they have been in the past? Do you want a supervisor on W.P.A. projects taking part in political campaigns and putting additional trucks on the job in name only in order that he may pay himself back for the money extracted from him by politicians." [90]

Similarly, Representative Ramspeck, a supporter of the Dempsey amendment, was unable to specify how the Act's objectives required more than the prohibitions of Sections 1-8:

"MR. RAMSPECK. It is a question of what you believe in. I know the gentleman does not agree with me about it, but I believe if we are going to maintain good government in this country and have a democratic form of government that is to survive, we have to remove the rank and file employees from beings pawns in the political game. That is what I believe. [Applause]. The gentleman has a right to his own opinion and of course I do not quarrel with him about that. But I believe that the thing that is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs and in contracts, by political parties and factions in power." [91]

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[89] *Id.* at 9622-23.

[90] *Id.* at 9605.

[91] *Id.* at 9616.

There is no further explanation in the debates demonstrating why or how the prohibitions of Sections 1-8 were inadequate.

The Hobbs amendment to the Dempsey amendment was defeated, and the Dempsey amendment passed on July 21.[92] Two days later the Senate agreed, again without debate, to the House revisions of S. 1871.[93] Along with the rest of the Hatch Act, Section 9 became law.

It is far from clear why the House (1) rejected its Judiciary Committee's deletion of the ban on partisan political activity, (2) then agreed nearly unanimously to delete the prohibition against partisan activity, thus effectively reinstating the Judiciary Committee's version of Section 9; (3) then, by refusing to adopt the Hobbs amendment to the Dempsey amendment, repudiated its second action and, indeed, went beyond the Senate version by extending the ban on voluntary, partisan activity beyond administrative and supervisory personnel. The debates do not disclose the reasons for this vacillation.

There was no debate on the Dempsey amendment's extension of the partisan political activity ban from administrative and supervisory employees to "any employee of the executive branch of the government" nor was there any debate on the wisdom of Civil Service Commission Rule I which Section 9 followed, even though Rule I was promulgated by Executive Order, rather than by act of Congress. Nor was there any explanation why the broad prohibition was necessary to remedy the evils described in the Sheppard Committee Report.

One significant fact emerges from analysis of the debates. The only body that debated, the House, did not point to any wider evil or greater threat than those brought

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[92] *Id.* at 9631.

[93] *Id.* at 9674.

to light by the Sheppard Committee: abuse of federal office and of relief programs through official, partisan coercion. Accordingly, no one answered Representative Hobbs' argument against the Act's overbreadth. The debates simply do not show that Congress was aiming at any problem that could not be controlled by legislation directed at the particular abuse itself. Thus, the legislative history of the Hatch Act compels the conclusion that the Congress failed to make any finding that the abuses it saw could not be remedied by measures less restrictive than a blanket prohibition against constitutionally protected, voluntary, partisan activity.

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1973

ROBERT SEAVER, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Appellants,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE STATE OF OREGON, AMICUS CURIAE

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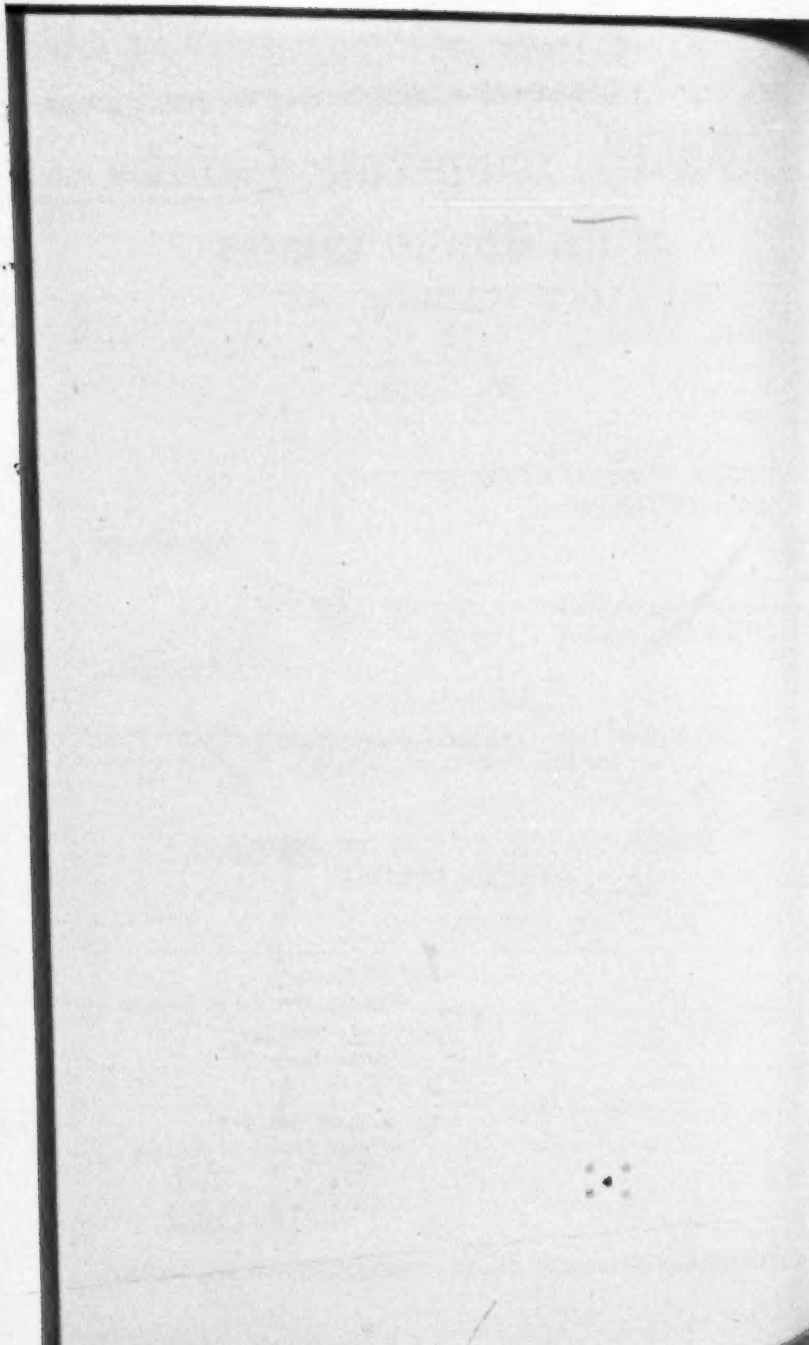

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BRIEF OF THE STATE OF OREGON, AMICUS CURIAE

INTEREST OF AMICUS

The Attorney General of the State of Oregon, files this brief amicus curiae in order to assist the court by indicating the experience of the State of Oregon with a statute prohibiting political activity by state employes.

ARGUMENT

The repeal of Oregon's "Little Hatch Act" has had no adverse effect.

The 1945 legislative assembly of the State of Oregon

enacted Oregon Laws 1945, ch 400, § 30. The section read:

> "No employe of any division or the commission shall use his official authority or influence to further the cause of any political party or candidate for nomination or election to public office. No person shall solicit from any employe of any division or the commission any money, influence, service or other valuable thing to further the cause of any political party or candidate for nomination or election to public office. No employe of any division or of the commission shall seek or accept nomination, election or appointment as an officer of a political party, club or organization, or serve as a member of a committee of any such club or organization, or be a candidate for a political office."

The 1967 legislative assembly repealed the statute. Oregon Laws 1967, ch 630, § 5.

Since the repeal of the law the state agencies charged with matters relating to employes of state agencies and divisions, the Personnel Division of the Executive Department and the Public Employe Relations Board, have had no instances of abuse of the power of political activity by state employes. Additionally there has been no appearance of coercion upon state employes by elected state officials.

This brief is filed in support of the position of the appellees, National Association of Letter Carriers, AFL-CIO, et al.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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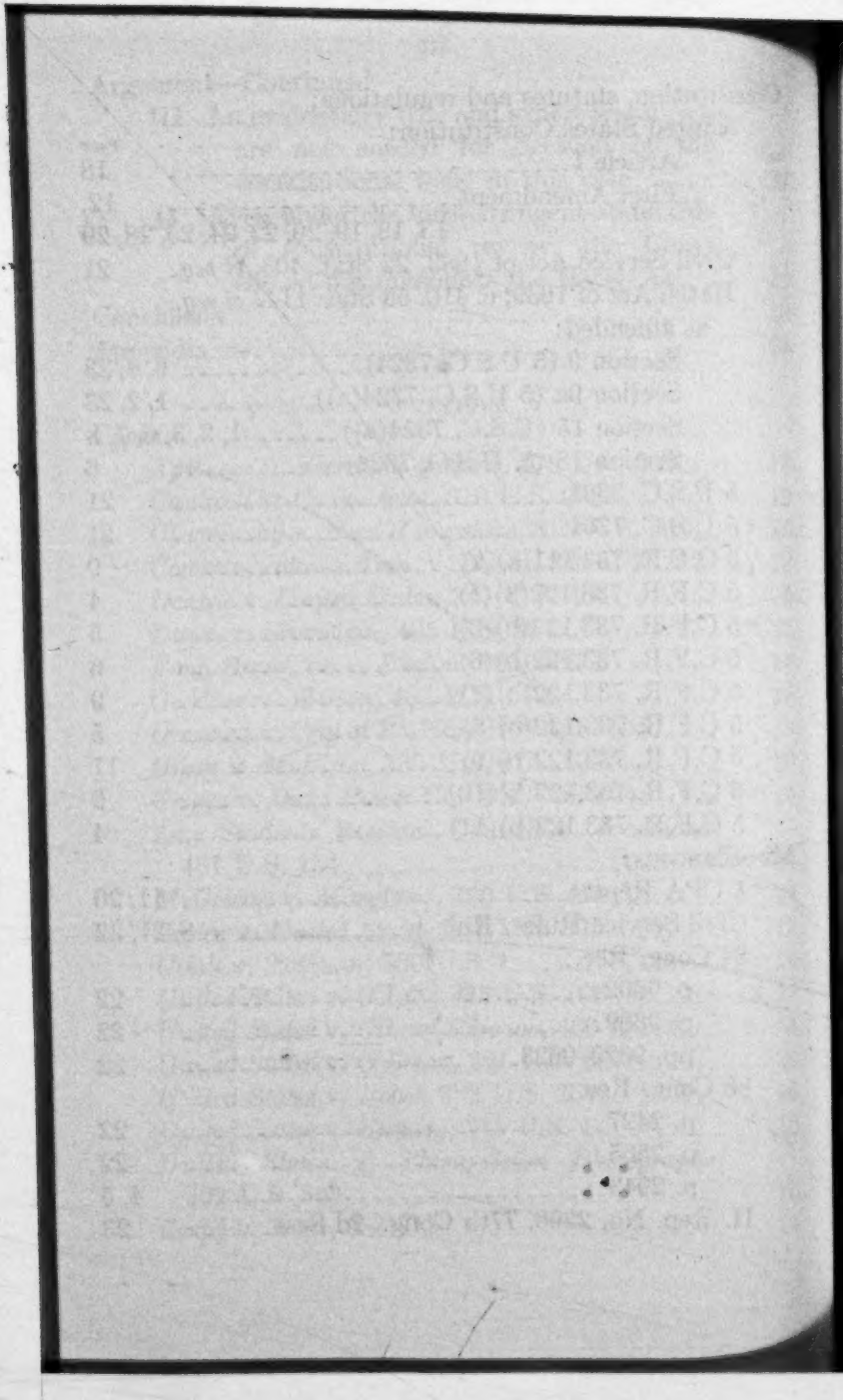

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UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

I. APPELLEES HAVE FAILED TO DEMONSTRATE THAT THE HATCH ACT IS VAGUE IN ANY SIGNIFICANT RESPECTS WARRANTING ITS FACIAL INVALIDATION

The discussion in both the district court's opinion and the appellees' brief of the alleged vagueness of the prohibition in Section 9(a) of the Hatch Act is written as though there were no statute at all, but merely some vague, ethereal ban on "politics." They appear at times to have lost sight completely of the specific language of the prohibition and of its definition in Section 15, which designate what Congress in fact prohibited. Section 9(a) states that "An employee in an

Executive agency * * * may not * * * take an active part in political *management* or in political *campaigns"* (emphasis supplied). Section 15, in defining the proscription, similarly refers to "those acts of political *management* or political *campaigning* which were prohibited * * *" (emphasis supplied).

Thus, the district court's concern that the prohibition of Section 9(a) might be applied against expression of views on such issues as "China, crime in the streets, inflation, foreign aid, national debt" (J.S. App. 9a), because "[i]n the end everything may appear political * * *" (*id.* at 10a), overlooks the fact that it is not political expression that is regulated by the Hatch Act, only "political management or political campaigning."[1] The central content and meaning of that concept is clear—as applied to any particular activity, the inquiry is necessarily directed not to whether the activity was, in the broad sense, "political," but whether it was undertaken as part of a partisan election campaign or in connection with the management of a political party.

The essential clarity of the political management and campaigning restriction is evident when one considers the kinds of activities in which the individual plaintiffs in this litigation wish to engage. For example, plaintiff Pinho "desires to become a precinct Democratic Committee Woman"; plaintiff Mandicino

[1] This same confusion is manifested in the testimony of Roger Jones quoted in the appellees' brief (p. 51). Of course, the postal worker may express his opinion on government programs to the housewife. If he thinks he cannot, it is hard to see why this mistake should be attributed to the Hatch Act or affect its validity.

engaged in "house-to-house campaigning for candidates of political parties"; plaintiff Wylie "actively * * * campaign[ed] as the Republican nominee for State Senator"; plaintiff Gee wishes to run for Borough Councilman; plaintiff Myers "desires to run as a Republican candidate in the 1971 partisan election for Mayor of West Lafayette, Indiana" (App. 8-10). There is not the least vagueness or uncertainty about the Act's prohibition of each of these activities, or of others that the individual plaintiffs indicate they wish to engage in.[2]

Appellees pitch their vagueness argument in large part on the uncertainty they perceive as to exactly what Congress intended to incorporate into the definition of prohibited campaigning and management in Section 15 (Br. 23). Admittedly, the precise source of the incorporated concept is uncertain, but the point has been belabored far beyond its significance to the constitutional inquiry in this case, since, under any reasonable view of what Congress incorporated (*i.e.*, any view except that all pre-1940 decisions were incorporated regardless of their consistency with the terms of the Hatch Act itself), the prohibition is the

[2] The only activity mentioned by any individual plaintiff about which there could be any element of doubt is plaintiff Hummel's desire to engage in "public endorsement of candidates of a political party for local, state, and national office" (App. 8). The main difficulty in evaluating this proposed activity is the vagueness with which it is described in the complaint. Mr. Hummel is, by the express terms of the Hatch Act, free to express publicly his support for any candidates. The only difficulty would arise if he does so in the context of, and as part of, an organized campaign—*e.g.*, by a speech at a voter rally or by making the endorsement in a campaign brochure.

same except in the most insignificant details and is clear enough to withstand the vagueness attack.

The Commission has been enforcing "voluntary" political activity restrictions for 66 years. During that time it has continuously proscribed certain basic activities constituting political management and campaigning, and it is these activities which are at the heart of the Hatch Act's prohibition. For example:

1. In 1939, the Commission prohibited service as a delegate, alternate, or proxy in any political convention (App. 96).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 23 of Form 1236.

In 1944, the same prohibition was found on page 9 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 22).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(11)).

2. In 1939, the Commission prohibited service on or for any political committee (App. 97).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 23 of Form 1236.

In 1944, the same prohibition was found on page 10 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 22).

Today the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(1)).

3. In 1939, the Commission prohibited the solicitation of political contributions by employees (App. 98).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 25 of Form 1236.

In 1944, the same prohibition was found on page 11 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 24).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(3)).

4. In 1939, the Commission prohibited employees from acting as watchers, challengers or checkers at the polls (App. 98).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 26 of Form 1236.

In 1944, the same prohibition was found on page 13 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 26).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(8)).

5. In 1939, the Commission prohibited candidacy for public office (App. 100).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 28 of Form 1236.

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In 1944, the same prohibition was found on page 14 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 27).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(6)).

Appellees' efforts to denigrate the Commission's regulations on the ground that they came 30 years after enactment of the Hatch Act and to dismiss the interpretation of Section 15 offered in the government's brief in this Court on the ground that it is a "contrary litigation posture" (Br. 25) evaporates in the face of the evidence that the Commission has consistently interpreted the Hatch Act's prohibition to incorporate the same specific types of conduct that were considered impermissible political management or campaigning at the time Section 15 was enacted, except insofar as Section 9's authorization of public expression of opinion on political subjects and candidates and Section 18's exclusion of activities in non-partisan elections curtailed that concept. (The Commission has never considered pre-1940 determinations inconsistent with Section 9 or Section 18 to be among those referred to in Section 15, for purposes of the Act's prohibition, as having been in effect on July 19, 1940, and we urge the Court to construe the statute consistently with this reasonable and long-standing Commission view.) Certainly appellees have failed to point to a single instance in which the Commission has applied a pre-1940 decision in a disciplinary proceeding despite a conflict with Section 9 or Section 18.

Notwithstanding the clear and consistent position of the Commission in this regard, appellees continue to insist that Section 15 incorporated all pre-1940 decisions (Br. 23–31). In effect, they would read Section 15 as though it said "* * * the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission *including determinations inconsistent with the provisions of this Act.*" The Commission reads the provision exactly to the contrary, as though the hypothetical italicized language read "but not including determinations inconsistent with the provisions of this Act." We submit that the latter is the only rational reading of the incorporation provision.[8]

Despite their strenuous efforts, appellees have been able to identify only one area (Br. 41–47) where there is any significant uncertainty about the precise contours of the management and campaigning prohibition—delineation of the point at which protected expression

[8] This interpretation of the statute also disposes of the appellees' suggestion that the Act prohibits such activities as betting on elections, campaigning on the liquor question, or circulating petitions to state, county, or municipal governments (Br. 58). While these were apparently prohibited under old Rule I, and the wagering prohibition appeared on Senator Hatch's card, they were excluded from the political campaigning and management prohibition of the Hatch Act by other provisions of the Act, and no employee has ever been subjected to disciplinary proceedings because of any violation of this sort.

on political subjects and candidates merges into prohibited campaigning.[4] We recognized in our opening brief that this is a difficult area in which borderline cases can arise (p. 48). Indeed, this particular difficulty was recognized at the time of the passage of Section 9 in 1939, as evidenced in a letter from Chairman Mitchell of the Commission to Senator Hatch discussing the content of the prohibition of Civil Service Rule I as adopted by the Hatch Act:[5]

> As you point out, the civil service rules confine classified employees to a *private* expression of opinion, whereas the word "privately" has been omitted from Section 9 of S. 1871. It is believed, however, that even under S. 1871 an expression of opinion which so far exceeds the limits of a private expression of opinion and assumes the aspect of a campaign speech or a canvass for votes, would be in violation of the general prohibition against taking an active part in political management or in political campaigns.

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[4] The only other area of potential uncertainty alluded to in the brief concerns financial contributions (Br. 41). However, the rule here is clear. The making of a voluntary financial contribution of whatever size, while it may violate other laws regulating campaign spending, can never by itself violate the Hatch Act because, standing alone, it is neither management nor campaigning. Of course, "[g]iven proper circumstances and publicity" (Appellees' Br. 41)—*i.e.*, if publicized as part of a candidate's campaign—it could be a prohibited activity. But the prohibition would arise not from the mere fact of the contribution, but from its being publicized by the employee in a campaigning context.

[5] This exchange of correspondence, which is set forth in an appendix to this brief, *infra*, pp. 31–35, took place prior to the enactment of Section 15.

The portion of the Commission's regulations most directly addressed to this area is Section 733.122(b)(7), which describes as a prohibited activity "[s]oliciting votes in support of or in opposition to a partisan candidate for public office or political party office." The precise interface of this prohibition with the recognition in Section 733.111(a)(2) of each employee's right to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates" is perhaps not as clear in some details as it could be, and the Commission is presently attempting to draft clarifying amendments to the regulations.[6]

However, the important point, glossed over by appellees, is that this is only one aspect of the Hatch Act's management and campaigning prohibition, which

[6] It is the Commission's position, reflected in its enforcement policies, that the employee is free to urge others to vote for a candidate in ordinary conversation, in personal letters to acquaintances, or in letters to the editor of a newspaper or other publication. The phrase "soliciting votes" was intended to refer to more formal and organized campaigning activities, such as telephone or door-to-door canvassing or endorsements in flyers or brochures given wide circulation to prospective voters.

Moreover, any imprecision in Section 733.122(b)(7) is largely dissipated by Section 733.122(b)(10) of the regulations, which makes it clear that expressions of opinion endorsing or opposing partisan candidates are prohibited only if done "in a political advertisement, a broadcast, campaign literature, or similar material." Thus, the questions asked at page 42 of appellees' brief about the kinds of opinions that may be expressed are readily and clearly answerable. The expression of opinion may indeed include "the final, explicit exhortation to vote for, or against, that candidate" so long as the medium of expression is not a campaign instrumentality as specified above.

also encompasses a number of other restrictions that are both important to the accomplishment of the congressional objective and clear. It would be most improper to invalidate the entire management and campaigning prohibition solely because there is some possibility of uncertainty in one facet of its application, particularly in view of the congressionally expressed desire to preserve valid applications of the legislation in the event particular applications are found invalid (see our opening brief at 59).

Finally, appellees seek to substantiate their vagueness argument by an assertion that most federal employees do not in fact correctly understand the prohibitions of the Act, basing this assertion upon a study conducted for the Commission on Political Activity (Br. 47–49). Whatever this survey may demonstrate regarding the knowledge and understanding of the typical federal employee, it is wholly immaterial to the constitutional inquiry in this case. In the first place, there is no indication that the employees surveyed had ever looked at the statute, regulations, or publications of the Civil Service Commission, or that they were encouraged or afforded an opportunity to do so at the time their response to the survey was solicited. The vagueness or precision of the statute and interpretive regulations is thus wholly irrelevant to the accuracy of their responses or their understanding of the prohibition. Surely the question that is pertinent to a vagueness inquiry is not whether people who have never examined the sources of the prohibition have some instinctive or God-given knowledge, but whether individuals can with reasonable facility in-

form themselves of the principles that regulate their conduct.

The questions asked in the survey in fact deal with subjects about which there is no vagueness or uncertainty. The following table appears in the Commission's report, listing the questions and the responses (1 CPA Report 20):

TABLE I.—PERCENTAGE RESPONSES OF FEDERAL EMPLOYEES AS TO WHAT POLITICAL ACTIVITIES THEY THINK THEY "CAN" AND "CANNOT" DO UNDER PRESENT HATCH ACT RULES

Activity	Can	Cannot	Not sure
(a) Make a speech at a rally held by a political party (prohibited)	15.8	69.4	14.6
(b) Put a political sticker on his own car (permitted)	63.0	24.4	12.5
(c) Hold office in a political party organization (prohibited)	8.5	80.6	10.7
(d) Run for state or national political office (prohibited)	8.9	81.0	9.6
(e) Write a letter to his senator or his congressman (permitted)	96.0	1.5	2.2
(f) Drive people to the polls on election day (prohibited)	45.0	40.5	14.2
(g) Run for a school board position where people are not candidates of either major political party (permitted)	66.5	15.8	17.3
(h) Become actively involved in local issues such as civil rights and taxes (permitted)	49.5	32.6	17.3
(i) Participate in voter registration drives (prohibited)	48.1	35.6	16.0
(j) Distribute campaign materials for a party or candidate (prohibited)	18.6	71.2	10.1

[1] Words in parentheses added for this report. Respondents were not asked if activity was prohibited or permitted.

Except for questions (e) and (h), which have nothing to do with political management or campaigning and are thus unrelated to the Hatch Act, and question (i) (see note 7, *infra*), every question is clearly answered by a specific provision of the Civil Service Commission's regulations, so that any employee with the least doubt as to the permissible scope of such activities can readily find a clear answer.[7] Thus the survey, if

[7] Questions (f) and (i) are formulated too ambiguously for a simple, accurate response. As the regulations make clear, driving voters to the polls is prohibited only if done "on behalf of a political party or partisan candidate" (Section 733.122(b)

it establishes anything of relevance to this case, merely shows that the most common questions about permissible and prohibited management and campaigning activities are readily and clearly answerable by recourse to the Commission's interpretive regulations and other publications.

II. THE CONTENTION THAT THE DEFICIENCIES OF THE HATCH ACT, IF ANY, CAN NOT BE CURED BY REFERENCE TO THE COMMISSION'S REGULATIONS OR BY JUDICIAL CONSTRUCTION IS IN ERROR

One of appellees' principal arguments is that the administrative construction of the Act's ban on political management and campaigning should not be considered in evaluating its constitutionality. The contention is accompanied by the further suggestion that no judicial construction of the statute to meet constitutional objections is appropriate (Br. 34–37).

A. THE FACT THAT THIS CASE TOUCHES UPON FIRST AMENDMENT INTERESTS DOES NOT PRECLUDE ADMINISTRATIVE AND JUDICIAL CONSTRUCTION OF THE STATUTE

Appellees suggest that it is inappropriate for the Court to evaluate the statute in light of the Commission's regulations because an imprecisely drawn statute "in the First Amendment area cannot be remedied by a regulation promulgated by an administrative agency" (Br. 34–35). No authority is cited in support of this proposition. Appellees' suggestion is plainly wrong, for it is in the First Amendment area

(9)). The same principle would apply to voter registration drives, which is the one activity covered in the questionnaire but not in the regulations. Voter registration activity is permitted except if undertaken on behalf of a party or candidate.

that this Court has most frequently acknowledged its "obligation * * * to take care to interpret [legislative enactments] so as to avoid a danger of unconstitutionality." *United States* v. *C.I.O.*, 335 U.S. 106, 120–121.[8]

B. IN ATTACKING THE ADMINISTRATIVE CONSTRUCTION, APPELLEES OVERLOOK THE FACT THAT THE CONTROLLING CONSTRUCTION OF THE ACT IS SUPPLIED BY THE COURT

Even if there were some support for the general proposition that statutory vagueness or overbreadth cannot be cured by administrative interpretation, the ultimate question, once a case is *sub judice*, is the appropriateness of a saving judicial construction. (We do not, however, as appellees suggest, concede the facial invalidity of the statute standing alone. The core meaning of "political management and political campaigning" is sufficiently clear that uncertainties about particular peripheral applications do not provide a justification for invalidation of the entire prohibition in all its applications. But the question of the validity of the statute merely on its face is

[8] In *United States* v. *C.I.O.*, this Court gave a narrowing construction to a provision in the Corrupt Practices Act, thereby removing "the gravest doubt * * * as to its constitutionality." 335 U.S. at 121. For other First Amendment cases in which the Court has avowedly sought to "save" a statute by construing it in a narrow manner, see, *e.g.*, *Scales* v. *United States*, 367 U.S. 203 (affirming a conviction for violation of the membership clause of the Smith Act, 18 U.S.C. 2385, after construing the membership clause to reach only "active" members); *United States* v. *Rumely*, 345 U.S. 41, 46 (construing the phrase "lobbying activities" in such a way as to avoid "doubts of constitutionality in view of the prohibition of the First Amendment").

no longer the issue once an authoritative administrative interpretation is available or if the Court engages in its traditional function of statutory construction.)

Ultimately, there is no meaningful analytic distinction between a court's action in itself formulating a narrowing construction and the court's adoption of a narrowing construction previously formulated by the agency responsible for the Act's administration. Obviously, the court is the final arbiter in both cases, deciding in each whether the statutory language is susceptible of clarification and whether the proposed interpretation fairly comports with the ascertainable legislative purpose. Moreover, this Court has recognized that in determining whether a putatively vague or overbroad statute can be clarified or delimited through a narrowing construction, the view of the agency charged with the statute's enforcement is at least entitled to "respectful consideration." *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 162–163.[9]

[9] Appellees find *Wadmond* inapposite because "unlike the Civil Service Commission here, [the agency there] had been explicitly entrusted with the power to make a definitive interpretation" (Br. 34, n. 20). But the principle of "respectful consideration" by the judiciary of an agency interpretation of a statute that the agency is charged with enforcing has never been limited to those situations where the agency has been delegated formal rulemaking power. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434; *United States* v. *City of Chicago*, 400 U.S. 8, 10. And, of course, there is no reason why the principle should be so limited where the claims involved are constitutional rather than statutory. Cf. *Zemel* v. *Rusk*, 381 U.S. 1, 11.

C. THIS CASE DOES NOT PRESENT THE TRADITIONAL GROUNDS FOR REFUSING TO SUPPLY A SAVING JUDICIAL CONSTRUCTION

This Court has indicated that the obligation to seek a "saving" construction of a statute rests upon the assumption that Congress "did not want to pass any legislation" that "threatened abridgment of the freedoms of the First Amendment." *United States* v. *C.I.O.*, 335 U.S. 106, 120. Thus, the principle that the Court should seek to "save" the statute by narrowly interpreting it is part and parcel of the more fundamental requirement that the Court should endeavor to give effect to congressional intent. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

In view of the basis upon which the principle rests, it is not surprising that this Court has announced only two exceptions to its general applicability, neither of which is applicable here. First, the Court has made it clear that it "lack[s] jurisdiction authoritatively to construe state legislation." *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369. See also *Gooding* v. *Wilson*, 405 U.S. 518, 520. Thus, while the Court is bound to adopt a state court's narrowing construction (see, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571), it will not undertake to "supply the requisite construction" itself. *Gooding* v. *Wilson*, *supra*, 405 U.S. at 520. This difference in the Court's role was aptly summarized in *Dennis* v. *United States*, 341 U.S. 494, 501–502:

> * * * [W]e must bear in mind that it is the duty of the federal courts to interpret federal leg-

> islation in a manner not inconsistent with the demands of the Constitution. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 407 (1950). We are not here confronted with cases * * * where a state court had given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate the judgments of conviction.

The second exception arises in those cases in which a narrowing construction would substantially alter or conflict with the legislative directive embodied in the statute under attack. Thus, the Court has indicated that it will not seek a "saving" construction of a federal statute where "[t]he clarity and preciseness of the provision in question make it impossible to narrow [it] * * * without substantial rewriting." *Aptheker* v. *Secretary of State,* 378 U.S. 500, 515. See also *United States* v. *Robel,* 389 U.S. 258, 262.

This case presents no such problem. Under almost any view of the constitutional issues presented by the Hatch Act's ban on partisan political management or campaigning, a statutory construction is possible that will eliminate any valid constitutional objections without significantly rewriting or in any way subverting the basic congressional directive.[10] Moreover, as

[10] Should the Court agree with the position of the Coalition of American Public Employees *et al.* (Amici Br. 42) that any restrictions on off-the-job political activities is overboard, however, we would agree that there would be no point in striving

pointed out in our opening brief (p. 59), the Court should be particularly disposed to adopting a "saving" construction, if it deems one necessary, in view of the congressional directive that valid portions of the legislation be preserved.

D. THE COURT SHOULD NOT INVALIDATE THE HATCH ACT BECAUSE OF ANY SUPPOSED ABSENCE OF CONGRESSIONAL JUDGMENT THAT THE PROHIBITION IS NECESSARY TO ACCOMPLISH THE ACT'S OBJECTIVES

Perhaps in awareness that this case does not fit into any category of constitutional adjudications in which the Court will decline to seek a "saving" construction, appellees advance a novel and unprecedented theory of inadequacy of congressional deliberations, in order to support the action of the district court. The basic

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for a saving construction, since no meaningful portion of the basic congressional decision could then be preserved. Contrary to this contention of overbreadth, however, Congress obviously determined that the federal employee's official and unofficial activities are, for the Act's purposes, so interrelated that in light of the interests at stake it is not feasible to make a distinction for regulatory purposes between "political activities engaged in by an employee in his capacity as a citizen and those done in his capacity as a government servant * * *" (Amici Br. 42). Moreover, the Hatch Act is not, as the amici apparently assume, limited in its purpose to assuring the impartial discharge of official duties. As summarized in our opening brief (pp. 9–11), at least two of the important objectives of the Act—protection of the integrity of the political process and protection of individual employees from coercive influence—are unrelated to that limited purpose. Thus, sole reliance upon the kind of legislative enactments recommended by the amici would not make it "exceedingly more difficult" (*McGowan* v. *Maryland*, 366 U. S. 420, 451) to achieve the congressional aims; it would make the achievement of those objectives impossible.

thrust of this assertion is that since the Hatch Act touches First Amendment interests, it must be supported by a legislative judgment that it is required by overriding governmental interests (Br. 35). Furthermore, this judgment, according to appellees, "cannot be inferred from the mere fact that the Congress passed the Act" (Br. 61). Appellees therefore review the legislative history (Br. 53–58) in search of an explanation of the prohibition or assertion of its necessity adequate to satisfy their view of the 1973 standards of constitutional analysis. Finding none that satisfies them, they conclude that the statute must fall for lack of adequate congressional findings, and that the Court would be intruding in the congressional domain if it construed the statute to sustain its constitutionality.

This analysis is erroneous both in the legal premise that the constitutionality of the statute turns in this way upon its legislative history and in the historical premise that Congress passed the Hatch Act without understanding what it was doing or giving due consideration to First Amendment concerns. Appellees err in suggesting that courts may infer nothing from the fact that the statute was enacted, but must instead search the published legislative history in order to establish that Congress believed that what it was doing was necessary. Certainly Article I of the Constitution, which specifies the affirmative requirements for valid exercise of the legislative power, does not require Congress to deliberate in a particular manner, or to articulate fully or in any particular way the basis for its legislative judgments.

Nor is there anything in the First Amendment, or in this Court's decisions, from which such a novel requirement can reasonably be inferred.

Certainly the cases cited by appellees fail to establish this proposition. In *Cantwell* v. *Connecticut,* 310 U.S. 296, 307, the Court was reviewing a conviction of a non-statutory, common law offense. In referring to a "statute evincing a legislative judgment" the Court was obviously alluding to the absence of any statute, and therefore of any legislative judgment. There is no suggestion that, given a statute proscribing certain conduct, the Court would have considered the adequacy of the thought processes of the legislators in enacting the statute. Similarly, *Green* v. *McElroy,* 360 U.S. 474, a procedural due process case, specifically turned upon the fact that the programs and procedures for denying security clearances without a hearing were not "the creature of statute or of an Executive Order issued by the President" (*id.* at 495). The Court's reluctance to deprive individuals of traditional rights of confrontation and cross-examination in the absence of an express congressional declaration establishing such procedures in no way supports appellees' proposition. Nor does anything in *Grayned* v. *City of Rockford,* 408 U.S. 104, suggest that the legislative judgment must be evidenced by anything other than the enactment itself—the Court's opinion in *Grayned* did not look behind the provisions of the ordinance itself for a supporting rationale.

The unsoundness of looking into underlying congressional motivations and judgments for purposes of

an inquiry into constitutional validity was explained by the Court in *United States* v. *O'Brien,* 391 U.S. 367, 383–384, which involved a somewhat different, but analogous, contention:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. * * * We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Moreover, it is clear here that Congress did make the kind of legislative judgment that appellees contend must be made before legislation affecting First Amendment rights can be either narrowly construed or validated. In the first place, it can hardly be gainsaid that Congress knew that it was prohibiting public employees from engaging in political management and campaigning. Nor can it be disputed that Congress had before it a substantial amount of material setting forth at least some of the problems that the Hatch Act was designed to remedy.[11] When, there-

[11] See the discussion entitled "The Enactment of the Hatch Act," at pp. 15–29 of our opening brief.

fore, Congress not only enacted laws prohibiting specific forms of abuse and coercion, but also banned political management and campaigning, it clearly made the "legislative judgment" that the latter measure was necessary to achieve the goal of an impartial civil service that would not threaten disruption of the political process.[12]

Appellees, however, are unwilling to draw the inference that the circumstances mandate and contend, instead, that Congress failed to consider whether the political activity ban was necessary. Indeed, they state that the failure to do so is understandable because "Congress shared the then prevailing notion of con-

[12] Appellees allege that "[t]he supporters of Section 9(a)'s sweeping restrictive provision did not point out a single abuse that could not be eliminated by the direct prohibitions on misuse of office contained in Sections 1 to 8 and the first sentence of Section 9(a)" (Br. 54). What they ignore, however, is that the prohibitions against coercion and misuse of official authority have applied to all federal employees in the executive branch ever since passage of the Civil Service Act of 1883, 22 Stat. 403 *et seq.* See generally 5 U.S.C. 3301 and 7301. Thus, Civil Service Rule 1, § 1, in its pre-Hatch Act form, provided that "[n]o person *in the executive civil service* shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof" (emphasis added). It was only the political activity ban contained in Civil Service Rule 1 that was limited to "[p]ersons * * * in the competitive classified service." (Rule 1 is set forth at App. 92.) Accordingly, all of those employees who engaged in coercion, intimidation and misuse of official authority during the 1936 and 1938 elections were already subject to the very prohibitions which appellees contend are adequate to preserve an impartial civil service. Congress clearly did not believe that the existing prohibitions, which covered excepted and non-classified employees as well as classified ones, were adequate, since in the face of these prohibitions it enacted the political activity ban.

stitutional law that, when a person entered government employment, he waived any First Amendment rights that the legislature, in its discretion, might previously have determined that government employees should not exercise" (Br. 57). But the Act's legislative history, far from supporting this assertion, shows, on the contrary, that Congress was well aware of the First Amendment implications of the ban on political management and campaigning, and took special care to limit the Act's prohibitions so as to avoid constitutional problems. This is borne out, among other ways, by the fact that Congress modified Rule I to provide that all persons retained the right "to express their opinions on all political subjects" both publicly and privately. See opening brief, pp. 17–18.

Moreover, there were many warnings in the debates by opponents of the political management and campaigning restriction that the law would unduly and unjustifiably curtail the rights of covered employees to participate in the political process.[13] That Congress adopted the prohibition in the face of such contentions amply establishes the conclusion that, in the judgment of Congress, the other provisions were insufficient to accomplish the legislative objective and the management and campaigning restriction was necessary for that purpose.[14]

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[13] See, *e.g.*, 84 Cong. Rec. 9602, 9609, 9622–9623; 86 Cong. Rec. 2427, 2565.

[14] Indeed, the exceptions from the Act's coverage of such persons as employees of the Alaska Railroad residing in municipalities on the line and employees who wish to engage in municipal political activities in the District of Columbia area, which the amici contend (Br. 37–40) show that the Act is

III. AN EVIDENTIARY TRIAL AND EXPERT TESTIMONY ARE NOT NEEDED FOR DECISION OF THE CONSTITUTIONAL ISSUE IN THIS CASE

Appellees seem to suggest (Br. 60–63) that whether the Hatch Act is constitutional is a question to be decided on the basis of an evidentiary record. They contend that because they "proffered evidence that the federal civil service merit system would not be jeopardized by permitting government employees freer exercise of their rights of speech and association" (Br. 61) [15] and the government offered no rebuttal, "[t]he only finding that a court could make, on the record in this case, is that there are feasible and less restrictive alternatives to remedy all the abuses within the target area of Section 9(a)'s second sentence. Hence, the statute must fall" (Br. 63).

While this Court will sometimes canvass the legislative alternatives in a case where it is alleged that a statute is overbroad (see, *e.g.*, *Dunn* v. *Blumstein*,

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under-inclusive and does not serve a compelling interest, are obviously designed to ameliorate the institutional impact of the political activity ban in areas where, but for the exception, a large percentage of the citizenry would be prohibited from engaging in partisan political management or campaigning. The exceptions thus manifest congressional sensitivity to implications of the restrictions being imposed and an effort to "tailor [the] statute" (Amicus Br. 40) for optimum achievement of its objectives without sacrifice of basic political values. Similarly, the exception for teachers (5 U.S.C. 7324) reflects a congressional judgment that the incremental potential for harm introduced by that exception is outweighted by the benefits that would accrue from having "students of the science of politics and government" (H. Rep. No. 2296, 77th Cong., 2d Sess. 2) give their opinions and actively participate in politics. *Ibid.*

[15] Appellees refer specifically to the affidavit and oral testimony of Roger W. Jones (Br. 61).

405 U.S. 330), the Court in such cases has never limited its review to those alternatives or justifications that appear in the evidentiary record. *Id.* at 343–360; *McGowan* v. *Maryland*, 366 U.S. 420, 449–453. The question of constitutionality is a question of law. To the extent there is a factual component, it involves evaluation of "legislative" facts and is not to be decided by a trial judge or a jury.[16]

IV. EVEN UNDER THE MOST STRINGENT STANDARDS OF CONSTITUTIONAL REVIEW, THE COURT SHOULD NOT INVALIDATE THE HATCH ACT

The "appropriateness of [the] governmental objective" in restricting partisan political management and political campaigning was not questioned by the district court (J.S. App. 3a) and does not appear to be seriously challenged by appellees. However, because the regulation touches First Amendment considerations, appellees would impose a heavy burden on the government to justify the means adopted by Congress as being necessary to the furtherance of a compelling governmental interest and to show that no less restrictive alternative is available to accomplish the legislative objectives. We believe the government demonstrably has a compelling interest in maintaining the integrity of the civil service, insulating government employees from pressure to engage in involuntary political activities, and protecting the integrity of the Nation's political processes from the adverse

[16] Surely it would be extraordinary to have the constitutionality of a major Act of Congress turn upon the tactical decision of a trial lawyer for the government not to engage in a "battle of experts" by introducing testimony supporting the legislative judgment.

effects of a mobilization of government employees on behalf of partisan political interests. The only issue of substance is whether the prophylactic approach of the Hatch Act can safely be abandoned without jeopardizing these important objectives, and to what extent this question is to be resolved by Congress rather than by the Court.

We do not believe that the Court should apply the stringent standards of review suggested by appellees to this legislation. Without minimizing the importance of the First Amendment activities that are subject to constraint by the Hatch Act, we think it significant for this purpose that these constraints are, as we have pointed out in our opening brief (pp. 7–11, 60), imposed here in part to foster other important First Amendment values.

Even under the most stringent standard of review, we submit that the Court should not find the Hatch Act prohibitions, reasonably construed, to be unnecessary to the accomplishment of the important governmental objectives at stake. This is not a case in which, as in *Dunn* v. *Blumstein, supra,* the Court's review of the legislation, in the context of the governmental purposes it is intended to serve, leaves it apparent that less restrictive alternatives can be formulated to meet these needs. There is, we readily concede, a body of opinion that the prophylactic provisions of the Hatch Act are not necessary to accomplish its objectives and that restrictions more narrowly directed at coercion and abuse of office will suffice. These were the views of those in Congress who opposed the Hatch Act, and they

are the views of appellees' witness Roger Jones. On the other hand, there is a substantial body of opinion that agrees with Congress' determination that the prophylactic approach is necessary to preserve a truly impartial civil service and to protect the integrity of the political process from coercive influences. Thus, even the Commission on Political Activity of Government Personnel, while it recommended that "the area of political activity permitted to Federal employees * * * [be expanded],"[17] did not call for repeal of all restrictions on partisan political activities.[18]

Some of the reasons for preserving the current approach were forcefully stated by Congressman Nelsen, one of the Commission's 12 members, in his separate statement of views accompanying the Commission's Report:[19]

"But I further believe that experience has shown that much of the protection for the employee against such pressures must come through the restrictions regarding political activity placed on each employee, wherever he may be in the government structure.

"The proposal to open the door to partisan political activity by the career Federal employee within either of the two major political parties of this country, in my judgment, is a first dangerous step toward a return to the political spoils system. There are numerous examples of testimony in the Commission hearings from Federal and State employees recommending that the

[17] CPA Report 3.

[18] See the summary of recommendations as set forth at 1 CPA Report 4–5.

[19] 1 CPA Report, 36–37.

present policy of the Hatch Act in this respect be maintained. If we are unable to adequately police pressures put on the Federal employee at the present time, operating as they are under the nonpartisan restrictions, how can we but believe that the injection of major partisan activities into the structure will make such enforcement virtually impossible? Under our political system I do not believe it is practically possible to deny any partisan candidate the freedom to manage and conduct his campaign in all respects allowed to his opponent, whether those activities go to solicitation of funds or other political action. Also, the local party organization is inextricably connected with the national party organizations. Local leaders almost inevitably play a part in the State and National political affairs. To think that we can confine a person's involvement in partisan politics to certain limits on the local level is wishful thinking.

"The possible benefits to be gained by allowing a desirous few to participate in partisan political candidacy and political management activity, when weighed against the dangers that such activity poses to an impartial, efficient public service and the hundreds of thousands of employees in it, is simply not worth the inherent risk in such action. The benefits of the impartial public service, whether they be of tenure, job assignments, and promotions on merit, or simply freedom from the many insidious types of pressures present in partisan operations, compensates the employee many times over in return for the relatively few restrictions placed on his action. Indeed,

under the present Hatch Act, and surely under a revised act should the Congress see fit to accept many of our recommendations, the Federal employee is and will be allowed far more liberty in political action than is actually taken by all but a very minor percentage of our population as a whole."

It is readily apparent that the question whether the Hatch Act's ban on partisan political activity is necessary to preserve the integrity of the federal civil service, and whether more direct and narrow prohibitions will suffice to prevent coercion of government employees, is one on which opinions reasonably differ. Congress, in light of its highly relevant practical political experience, made the judgment that the restriction was necessary when it passed the Hatch Act, and, as we have shown, there is ample basis for concluding that the judgment remains a sound one today. In light of the complex nature of the problem, the political judgment required in solving it, and the manifest reasonableness of the congressional solution, we submit that the legislative judgment should be sustained by this Court. As the Court stated in *Communications Assn.* v. *Douds,* 339 U.S. 382, 400–401:

> This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the

necessity or desirability of the statute for that of Congress. * * *

Congress, if it sees fit to do so, could of course experiment with a materially less restrictive approach, in the hope that it would not give rise to the adverse consequences feared or, at least, that the magnitude of those adverse consequences would be outweighed by the benefits of allowing government employees greater freedom of political activity. If such an experiment proved unsuccessful—if it proved a threat to the integrity of the political processes or of the public service—then Congress could take appropriate corrective action. But the needed flexibility to attempt to provide maximum protection for all the First Amendment interests involved in this complex area would be lost if this Court were to hold that the Constitution will permit only one particular solution. The Court should leave Congress some room to move around, some room in which to exercise its grant of legislative power.

CONCLUSION

For the foregoing reasons, as well as the rea
stated in our opening brief, the judgment of the
trict court should be reversed and the compl
should be ordered dismissed.

Respectfully submitted.

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MARCH 1973.

APPENDIX

U.S. SENATE,
COMMITTEE ON AGRICULTURE AND FORESTRY,
July 26, 1939.

Hon. HARRY B. MITCHELL,
President, United States Civil Service Commission,
Washington, D.C.

MY DEAR MR. MITCHELL: Senate Bill 1871, which has passed both branches of the Congress and now awaits Presidential action, contains one section which is practically identical with Rule I of the Civil Service relating to political activity. I enclose a copy of the bill as it passed the Congress and direct your particular attention to Section 9 thereof. With the exception of the word "privately" which is eliminated, you will observe the principal parts of this section follow the language of the Civil Service Rule I. In drafting this section, I adopted this rule, hoping that we could have the same rule applicable to all employees of the Federal government. I am constantly called upon for interpretations of the meaning of political activity as used in this section. I want them to have and think the words should have the same interpretation under this bill which the Civil Service gives to the words appearing in Rule I, hence this letter.

I shall briefly enumerate some of the things which I think are included in the bill and some which are not, and would like to have your opinion on my interpretation, especially whether the Commission has differently interpreted the Civil Service rule. Under my construction of this language, among other things, the following would be prohibited:

1. The holding of office in political party organizations;

2. Attending caucuses or conventions as delegates thereto;

3. Holding office or other activity in political conventions or caucuses;

4. Soliciting campaign contributions;

5. Making political speeches or soliciting votes or support in behalf of candidates or parties in primary or general elections;

6. Becoming a candidate for office or nomination in primary, convention or general elections;

7. Membership in organizations formed merely for partisan political purposes.

The following would not be prohibited and employees would be permitted to:

1. Make voluntary contributions to political parties;

2. To freely express political opinions on all subjects;

3. To attend any political meeting as a spectator (perhaps even sit on the platform. ?)

4. To attend social functions even though political speeches might be made and proceeds from the sale of dinner tickets are to be used for political purposes, such as Jackson Day dinners, etc., provided of course attendance at such functions was purely voluntary.

Will you please, at your earliest possible convenience give me your views on these matters in writing. For many reasons, it is necessary that I have your construction as quickly as possible. Any suggestions along this general line as to what would or would not be included in the term, "political activity", would be appreciated.

Your very truly,

CARL A. HATCH.

JULY 28, 1939.

Hon. CARL A. HATCH,
U.S. Senate.

DEAR SENATOR HATCH: I am pleased to acknowledge receipt of your letter of July 26, 1939, regarding the interpretation of Senate Bill 1871, "To Prevent Pernicious Political Activities", which has passed both branches of Congress and is now awaiting action by the President.

Section 9 of the enactment reads substantially the same as Section 1 of Civil Service Rule I, and your interpretation of Section 9 appears to be the same as the interpretation which the Commission has placed on Civil Service Rule I. I am enclosing a copy of a pamphlet published by the Commission giving detailed information regarding the civil service rules, Executive orders, and statutes concerning political activity and political assessments of Federal officeholders and employees, and am indicating below for your convenience the page and section of this pamphlet in which the particular types of political activity are discussed.

Section 1 of Civil Service Rule I is interpreted to prohibit the following types of political activities on the part of employees in the classified civil service:

1. The holding of office in political party organizations. (Page 4, sections 14 and 15).

2. Attendance at caucuses or conventions as delegates. (Page 4, section 12).

3. Holding office or other activity at political conventions or caucuses. (Page 4, section 13).

4. Soliciting campaign contributions. (Page 5, section 16). The solicitation of political contributions by any person who is in the service of the United States or who is receiving compensation for services from money derived from the Treasury of the United States, regardless of whether

such person is in the classified civil service or not, from any other such officer or person is a violation of Section 118 of the Criminal Code. (Page 17, section 39, et. seq.)

5. Making political speeches or soliciting votes or support in behalf of candidates or parties in primaries or general elections. (Page 5, sections 18 and 19).

6. Becoming a candidate for office or nomination in primary conventions or general elections.

Such activity on the part of a classified employee is prohibited under Section 1 of Civil Service Rule I, except in such cases where special permission has been extended by Executive order, such as in the case of employees residing in municipalities adjacent to the District of Columbia and in the case of employees at navy yards or arsenals and military establishments of the War Department. (Page 7, section 29; pages 12 and 13).

Section 1 of Civil Service Rule I has been construed to permit classified employees to engage in the following types of activity:

1. Membership in clubs or organizations formed for purely partisan political purposes (page 4, sections 15 and 14), provided the employee is not an active member, an officer, or a member of any committee.

2. The making of a voluntary contribution to political parties. (Page 5, section 16). It is a violation of Section 121 of the Criminal Code, however, for an employee to make such a contribution to another Government employee, regardless of whether or not either employee is in the classified civil service. (Page 19, section 46).

3. The private expression of political opinions. (Page 5, section 18).

As you point out, the civil service rules confine classified employees to a *private* expression of opinion, whereas the word "privately" has been omitted from Section 9 of S. 1871. It is believed, however, that even under S. 1871 an expression of opinion which so far exceeds the limits of a private expression of opinion and assumes the aspect of a campaign speech or a canvass for votes, would be in violation of the general prohibition against taking an active part in political management or in political campaigns.

4. Attendance at political meetings as a spectator. (Page 5, section 17; page 4, sections 12 and 13).

5. Attendance at social functions where political speeches may be made and the proceeds from the sale of dinner tickets may be used for political purposes, such as at Jackson Day dinners.

The Commission construes attendance at such functions as in the same light as attendance at political meetings, and a classified employee may therefore attend such functions as an inactive participant. Although the contributions made at such functions purport to be the purchase price of the dinner tickets, they are in actuality political contributions and must not be made or solicited in violation of the statutes which I have already mentioned prohibiting the solicitation or receipt of political contributions between Federal employees.

I trust the information herein will serve your purposes. If there is any further way in which I can be of assistance I shall be happy to do so.

Sincerely yours,

HARRY B. MITCHELL,
President.

U.S. GOVERNMENT PRINTING OFFICE: 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES CIVIL SERVICE COMMISSION ET AL. *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–634. Argued March 26, 1973—Decided June 25, 1973

Some individual federal employees, an employees' union, and certain local Democratic and Republican political committees filed this action challenging as unconstitutional on its face the prohibition in § 9 (a) of the Hatch Act, now 5 U. S. C. § 7324 (a) (2), against federal employees' taking "an active part in political management or in political campaigns." The section defines the phrase as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." The three-judge District Court recognized the "well-established governmental interest in restricting political activities by federal employees," but held that the statutory definition of "political activity," the constitutionality of which was left open in *United Public Workers* v. *Mitchell*, 330 U. S. 75, was vague and overbroad, and thus unconstitutional. *Held:*

1. The holding of *Mitchell*, *supra*, that federal employees can be prevented from holding a party office, working at the polls, and acting as party paymaster for other party workers is reaffirmed. Congress can also constitutionally forbid federal employees from engaging in plainly identifiable acts of political management and political campaigning, such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating

Syllabus

petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention. Pp. 5–18.

2. It is the Civil Service Commission's regulations regarding political activity, the legitimate descendants of the 1940 restatement adopted by the Congress, and, in most respects the reflection of longstanding interpretations of the statute by the agency charged with its interpretation and enforcement, and the statute itself, that are the bases for rejecting the claim that the Act is unconstitutionally vague and overbroad. Pp. 18–31.

(a) The regulations specifying the various activities deemed prohibited by § 7324 (a)(2) are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and observe, without sacrifice to the public interest, and are not impermissibly vague. Pp. 26–29.

(b) There is nothing fatally overbroad about the statute considered in connection with the Civil Service Commission's construction of its terms represented by the current regulations. The restrictions on endorsements in advertisements, broadcasts, and literature, and on speaking at political party meetings in support of partisan candidates for public or party office, the major areas of difficulty, are clearly stated, are normally performed only in the context of partisan campaigns by one taking an active role in them, and are sustainable just as the other acts of political campaigning are constitutionally proscribable. They do not, therefore, render the rest of the statute vulnerable for overbreadth. Pp. 29–31.

(c) Even if the provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects constitutionally overbroad, they would not invalidate the entire statute. Pp. 31–32.

346 F. Supp. 578, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-634

United States Civil Service Commission et al., Appellants, v. National Association of Letter Carriers, AFL-CIO, et al.	On Appeal from the United States District Court for the District of Columbia.

[June 25, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

On December 11, 1972, we noted probable jurisdiction of this appeal, 409 U. S. 1058, based on a jurisdictional statement presenting the single question whether the prohibition in § 9 (a) of the Hatch Act, now codified in 5 U. S. C. § 7324 (a)(2), against federal employees taking "an active part in political management or in political campaigns," is unconstitutional on its face. Section 7324 (a) provides:

> "An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—
>
> "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> "(2) take an active part in political management or in political campaigns.
>
> "For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited

on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." [1]

A divided three-judge court sitting in the District of Columbia had held the section unconstitutional. 346 F. Supp. 578 (1972). We reverse the judgment of the District Court.

I

The case began when the National Association of Letter Carriers, six individual federal employees and certain local Democratic and Republican political committees filed a complaint, asserting on behalf of themselves and all federal employees that 5 U. S. C. § 7324 (a)(2) was unconstitutional on its face and seeking an injunction against its enforcement.[2]

Each of the plaintiffs alleged that the Civil Service Commission was enforcing, or threatening to enforce, the Hatch Act's prohibition against active participation in political management or political campaigns with respect to certain defined activity in which that plaintiff

[1] The Hatch Act is found in Titles 5 and 18 of the United States Code, both of which have been enacted into positive law. 80 Stat. 378, 62 Stat. 683. Section 7324 (a)(2) of Title 5 is derived from two sections in the Act, with the prohibition against certain political activity being found in § 9 (a), 53 Stat. 1148, while the portion defining the proscribed activity stems from § 15, 54 Stat. 771.

[2] The complaint made the same allegations with respect to 5 U. S. C. § 1502 (a)(3), the provision taken from § 12 (a) of the Hatch Act, 54 Stat. 767, which imposes similar prohibitions on certain state employees working in programs that are federally financed. The District Court, however, while holding the class action was proper with respect to federal employees, held that none of the parties was properly representative of state employees covered by the Act. 346 F. Supp., at 579, n. 1. Hence only § 7324 (a)(2) with respect to federal employees is before us in this case.

desired to engage.[3] The Union, for example, stated among other things that its members desired to campaign for candidates for public office. The Democratic and Republican Committees complained of not being able

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[3] The Union alleged that its members were desirous of

"a. Running in local elections for such offices as school board member, city council member or mayor.

"b. Writing letters on political subjects to newspapers.

"c. Participating as a delegate in a political convention and running for office in a political party.

"d. Campaigning for candidates for political office." App. 6–7.

The Democratic and Republican Committees complained that they had been deterred "from seeking desirable candidates who are Federal or state employees covered by the Hatch Act to run on the Democratic or Republican ticket for state and local offices. In addition, numerous individuals who would otherwise desire and be available to become members of Plaintiff Committees have been and continue to be deterred from doing so by said provisions of the Hatch Act." *Id.*, at 7.

Plaintiff Hummel alleged that he desired to engage in a wide variety of political activities including "(1) participation as a delegate in conventions of a political party; (2) public endorsement of candidates of a political party for local, state and national office; (3) work at polling places on behalf of a political party during elections; (4) holding office in a political club. As a result of inquiries of the Civil Service Commission and his knowledge of the Hatch Act, Plaintiff Hummel is aware that such activities violate the Hatch Act." *Id.*, at 7–8.

Plaintiff Pinho alleged that she desired to become a precinct Democratic Committee Woman in the Arlington County Democratic Committee and to campaign for certain Democratic candidates for the United States House of Representatives and for the United States Senate. *Id.*, at 8.

Plaintiff Mandicino alleged that as an active member and officer of Plaintiff Union he "was compelled to engage in political activities prohibited by . . . the Hatch Act in order to carry out the responsibilities of his offices," and that he had engaged in those "activities including house-to-house campaigning for candidates of political parties, participation as a delegate in conventions of a

to get federal employees to run for state and local offices. Plaintiff Hummel stated that he was aware of the provision of the Hatch Act and that the activities he desired to engage in would violate that Act as, for example, his participating as a delegate in a party convention or holding office in a political club.

A three-judge court was convened, and the case was tried on both stipulated evidence and oral testimony. The District Court then ruled that § 7324 (a)(2) was unconstitutional on its face and enjoined its enforcement. The court recognized the "well-established governmental interest in restricting political activities by federal employees which [had been] asserted long before enactment of the Hatch Act," 346 F. Supp., at 579, as well as the fact that the "appropriateness of this governmental objective was recognized by the Supreme Court of the United States when it endorsed the objective of the Hatch Act. *United Public Workers* v. *Mitchell*, 330 U. S. 75 . . . (1947) . . . ." *Id.*, at 580.

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political party, active participation in the affairs of a political party, and fund raising on behalf of political parties and candidates." *Ibid.*

Plaintiff Wylie alleged that he had resigned his position in the Department of Health, Education, and Welfare, a position in the competitive civil service, to run as a Republican candidate for the Maryland State Senate. During the campaign he was employed as a consultant by the Department on a part-time basis. After his defeat he sought re-employment on a permanent basis but because of the dispute over his political activities while acting as a consultant, his re-employment had been delayed for a period of time, all to his financial loss and mental anguish. *Id.*, at 9.

Plaintiff Gee alleged that he desired to, but did not, file as a candidate for the office of Borough Councilman in his local community for fear that his participation in a partisan election would endanger his job. *Ibid.*

Plaintiff Myers alleged that he desired to run as a Republican candidate in the 1971 partisan election for the mayor of West Lafayette, Indiana, and that he would do so except for fear of losing his job by reason of violation of the Hatch Act. *Id.*, at 10.

The District Court ruled, however, that *Mitchell* left open the constitutionality of the statutory definition of "political activity," *ibid.*, and proceeded to hold that definition to be both vague and overbroad, and therefore unconstitutional and unenforceable against the plaintiffs in any respect. The District Court also added, *id.*, at 585, that even if the Supreme Court in *Mitchell* could be said to have upheld the definitional section in its entirety, later decisions had so eroded the holding that it could no longer be considered binding on the District Court.

II

As the District Court recognized, the constitutionality of the Hatch Act's ban on taking an active part in political management or political campaigns has been here before. This very prohibition was attacked in the *Mitchell* case by a labor union and various federal employees as being violative of the First, Ninth, and Tenth Amendments and as contrary to the Fifth Amendment as being vague and indefinite, arbitrarily discriminatory, and a deprivation of liberty. The Court there first determined that with respect to all but one of the plaintiffs there was no case or controversy present within the meaning of Art. III because the Court could only speculate as to the type of political activity the appellants there desired to engage in or as to the contents of their proposed public statements or the circumstances of their publication. As to the plaintiff Poole, however, the court noted that "he was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers." 330 U. S., at 94. Plainly, the Court thought, these activities fell within the prohibition of § 9 of the Hatch Act against taking an active part in political management

or political campaigning; and "[t]hey [were] also covered by the prior determinations of the [Civil Service] Commission," *id.*, at 103 (footnote omitted), as incorporated by § 15 of the Hatch Act,[4] the Court relying on a Civil Service Commission publication, Political Activity and Political Assessments, Form 1236, September 1939, for the latter conclusion. *Id.*, at 103, n. 38. Poole's complaint thus presented a case or controversy for decision, the question being solely whether the Hatch Act "without violating the Constitution, [could make this conduct] the basis for disciplinary action." 330 U. S., at 94. The court held that it could. ". . . [T]he practice of excluding classified employees from party offices and personal activity at the polls ha[d] been in effect for several decades," *id.*, at 96; and the Supreme Court, over a single dissent, in *Ex parte Curtis*, 106 U. S. 371 (1882), had previously upheld the longstanding prohibition forbidding federal employees "from giving or receiving money for political purposes from or to other employees of the government," 330 U. S., at 96. "The conviction that an actively partisan governmental personnel threatens good administration has deepened since . . . *Curtis*," *id.*, at 97–98, Congress having recognized the "danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections." *Id.*, at 98 (footnote omitted).

The Government, the Court thought, was empowered to prevent federal employees from contributing energy as well as from collecting money for partisan political ends:

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[4] Section 15 of the Hatch Act, now codified in 5 U. S. C. § 7324 (a)(2), see n. 1, *supra*, defined the prohibition against taking "an active part in political management or in political campaigns" as proscribing those activities that the Civil Service Commission had determined up to the time of the passage of the Hatch Act were prohibited for classified civil service employees. The role and scope of § 15 are discussed in the text, *infra*.

"Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection." *Id.*, at 99 (footnote omitted). Another Congress might determine otherwise, but "[t]he teaching of experience . . . evidently led Congress to enact the Hatch Act," *id.*, at 99, which the Court refused to invalidate and which it viewed as leaving "untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency." *Ibid.* The Act did not interfere with a "wide range of public activities." *Id.*, at 100. It was "only partisan political activity that is interdicted. . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success." *Ibid.* The court concluded that what Mr. Poole had done was within the power of Congress and the Executive to prevent.

We unhesitatingly reaffirm the *Mitchell* holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nomi-

nating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

A

Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited. That this judgment eventuated is indisputable, and the major steps in reaching it may be simply and briefly set down.

Early in our history, Thomas Jefferson was disturbed by the political activities by some of those in the Executive Branch of the Government. See 10 Richardson, Messages and Papers of the Presidents 98 (1899). The heads of the executive departments, in response to his directive, issued an order stating in part that "[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." *Id.*, at 98–99.[5]

There were other voices raised in the 19th century against the mixing of partisan politics and routine

[5] Senator Hatch quoted from this order in the debate on the 1940 amendments to the Hatch Act, 86 Cong. Rec. 2433–2434.

federal service. But until after the Civil War, the spoils system under which federal employees came and went depending upon party service and changing administrations, rather than meritorious performance, was much the vogue and the prevalent basis for governmental employment and advancement. 1 Report of Commission on Political Activity of Government Personnel, Findings and Recommendations, 7–8 (1968). That system did not survive. Congress authorized the President to prescribe regulations for the creation of a civil service of federal employees in 1871, 16 Stat. 514; but it was the Civil Service Act of 1883, c. 27, 22 Stat. 403, known as the Pendleton Act, H. Kaplan, The Law of Civil Service 9–10 (1958), that declared that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service" and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." 22 Stat. 404. That Act authorized the President to promulgate rules to carry the Act into effect and created the Civil Service Commission as the agency or administrator of the Act under the rules of the President.

The original Civil Service rules were promulgated on May 7, 1883, by President Arthur. Civil Service Rule I repeated the language of the Act that no one in the executive service should use his official authority or influence to coerce any other person or to interfere with an election, but went no further in restricting the political activities of federal employees. 8 Richardson, Messages and Papers of the Presidents 161 (1899). Problems with political activity continued to arise, Twenty-fourth Annual Report of the Civil Service Commission, 7–9 (1908),* and one form of remedial action was taken in

*In 1886, for example, President Cleveland, through an Executive Order, warned federal employees "against the use of their official

1907 when in accordance with Executive Order 642 issued by President Theodore Roosevelt, 1 Report of Commission on Political Activity, *supra*, at 9, § 1 of Rule I was amended to read as follows:

> "No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. *Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.*" Twenty-fourth Annual Report of the Civil Service Commission, *supra*, at 104 (emphasis added).

It was under this rule that the Commission thereafter exercised the authority it had to investigate, adjudicate, and recommend sanctions for federal employees thought to have violated the rule. See Howard, Federal Restrictions on the Political Activity of Government Employees, 35 Am. Pol. Sci. Rev. 470, 475 (1941). In the course of these adjudications, the Commission identified and developed a body of law with respect to the conduct of federal employees that was forbidden by the prohibition against taking an active part in political management or political campaigning. Adjudications under Civil Service Rule I spelled out the scope and meaning of the rule in the mode of the common law, 86 Cong. Rec. 2341–2342; and the rules fashioned in this manner were from time to time stated and restated by the Commission for the guidance of the federal establishment. Civil Service Form 1236 of September 1939, for example, purported to publish and restate the law of "Political Ac-

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positions in attempts to control political movements in their localities." 8 Richardson, Messages and Papers of the Presidents 494 (1899).

tivity and Political Assessments" for federal office holders and employees.

Civil Service Rule I covered only the classified service. The experience of the intervening years, particularly that of the 1936 and 1938 political campaigns, convinced a majority in Congress that the prohibition against taking an active part in political management and political campaigns should be extended to the entire federal service. 84 Cong. Rec. 4304, 9595, 9604, and 9610. A bill introduced for this purpose, S. 1871, "to prevent pernicious political activities," easily passed the Senate, 84 Cong. Rec. 4191–4192; but both the constitutionality and the advisability of purporting to restrict the political activities of employees were heatedly debated in the House. *Id.*, at 9594–9639. The bill was enacted, however, 53 Stat. 1147. This was the so-called Hatch Act, named after the Senator who was its chief proponent. In its initial provisions, §§ 1 and 2, *id.*, at 1147, it forbade anyone from coercing or interfering with the vote of another person and prohibited federal employees from using their official positions to influence or interfere with or affect the election or nomination of certain federal officials. Sections 3 and 4 of the Act, *id.*, at 1147–1148, prohibited the promise of, or threat of termination of, employment or compensation for the purpose of influencing or securing political activity, or support or opposition for any candidate.

Section 9 (a), which provided the prohibition against political activity now found in 5 U. S. C. § 7324 (a)(2), with which we are concerned in this case, essentially restated Civil Service Rule I, with an important exception. *Id.*, at 1148. It made it

> "unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an

> election or affecting the result thereof. No officer or employee of the executive branch of the Federal Government, or any agency or department thereof, shall take any part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects."

Excepted from the restriction were the President, Vice President, and specified officials in policy-making positions. Section 9 (b), *ibid*, required immediate removal for violators and forbade the use of appropriated funds thereafter to pay compensation to such persons.

Section 9 differed from Civil Service Rule I in important respects. It applied to all persons employed by the Federal Government, with limited exceptions; it made dismissal from office mandatory upon an adjudication of a violation; and, whereas Civil Service Rule I had stated that persons retained the right to express their private opinions on all political subjects, the statute omitted the word "private" and simply privileged all employees "to express their opinions on all political subjects."

On the day prior to signing the bill, President Roosevelt sent a message to Congress stating his conviction that the bill was constitutional and recommending that Congress at its next session consider extending the Act to state and local government employees. 84 Cong. Rec. 10745–10747 and 10875. This, Congress quickly proceeded to do. The Act of July 19, 1940, c. 640, 54 Stat. 767, in § 12 (a), *ibid.*, amended the Hatch Act by extending its provisions to officers and employees of state and local agencies "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States . . . ." The Civil Service Commission was empowered under § 12 (b), *id.*, at 768, to investigate and adjudicate violations of the Act by state and local

employees. Also relevant for present purposes, § 9 (a) of the Hatch Act was amended so that all persons covered by the Act were free to "express their opinions on all political subjects *and candidates.*" *Id.*, at 767 (emphasis added). Moreover, § 15, *id.*, at 771, defined § 9 (a)'s prohibition against taking an active part in political management or in political campaigns as proscribing "the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified Civil Service of the United States by the provisions of the civil service rules prohibiting such employees from taking any active part in political management or in political campaigns." Under § 18, *id.*, at 772, now 5 U. S. C. § 7326, the prohibition against political activity was not to be construed to prohibit political activity in nonpartisan elections or in connection with questions not specifically identified with any national or state political party, such as "questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character . . . ."[7]

In 1950, 64 Stat. 475, § 9 (b), of the Act, requiring removal from office for violating the Act, was amended by providing that the Commission by unanimous vote could impose a lesser penalty, but in no case less than 90 days suspension without pay. The minimum sanction was reduced to 30 days suspension without pay in 1962. 76 Stat. 750.

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[7] The 1940 amendments to the Hatch Act, 54 Stat. 767–772, also provided, *inter alia*, for a limitation on certain campaign contributions, § 13, 54 Stat. 770; for federal employees in municipalities in the vicinity of the District of Columbia, with the approval of the Commission, to engage in political activity, § 16, *id.*, at 771; and for a limitation on receipts and expenditures of political committees, § 20, *id.*, at 772.

In 1966, Congress determined to review the restrictions of the Hatch Act on the partisan political activities of public employees. For this purpose, the Commission on Political Activity of Government Personnel was created. 80 Stat. 868. The Commission reported in 1968, recommending some liberalization of the political activity restrictions on federal employees, but not abandoning the fundamental decision that partisan political activities by government employees must be limited in major respects. 1 Report of Commission on Political Activity of Government Personnel, *supra*. Since that time, various bills have been introduced in Congress, some following the Commission's recommendations [8] and some proposing much more substantial revisions of the Hatch Act.[9] In 1972, hearings were held on some proposed legislation; but no new legislation has resulted.[10]

This account of the efforts by the Federal Government to limit partisan political activities by those covered by the Hatch Act should not obscure the equally relevant

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[8] H. R. 2372, 91st Cong., 1st Sess.; S. 2032, 92d Cong., 1st Sess.; S. 3417, 92d Cong., 2d Sess.; S. 235, 93d Cong., 1st Sess. For the legislation recommended by the Committee on Political Activity, see 1 Report of Commission on Political Activity of Government Personnel, Findings and Recommendations, 44–60 (1968).

[9] H. R. 19214, 91st Cong., 2d Sess.; H. R. 914, 92d Cong., 1st Sess.; S. 3374, 92d Cong., 2d Sess.; H. R. 668, S. 350, 93d Cong., 1st Sess.

[10] Hearings on S. 3374 and S. 3417 before the Committee on Post Office and Civil Service, 92d Cong., 2d Sess. Congress has extended the restrictions on political activity to persons not previously covered. The Economic Opportunity Act of 1964, 78 Stat. 530, as amended 42 U. S. S. § 2943, extended the restrictions to certain employees of private corporations, 42 U. S. C. § 2943; the Postal Reorganization Act, 84 Stat. 719, made the provisions applicable to the Postal Service, 39 U. S. C. § 410; and the Emergency Employment Act of 1971, 85 Stat. 153, extended the provisions to personnel employed in the administration of programs established under the Act, 42 U. S. C. § 4881 (h) (Supp. I).

fact that all 50 States have restricted the political activities of their own employees.[11]

B

Until now, the judgment of Congress, the Executive and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government and employees themselves are to be sufficiently free from improper influences. *E. g.*, 84 Cong. Rec. 9598, 9603; 86 Cong. Rec. 2360, 2621, 2864, 9376. The restrictions so far imposed on federal employees are not aimed at particular parties, groups or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

But as the Court held in *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968), the government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought

[11] See generally, *Broadrick* v. *Oklahoma*, *post*, p. —, and *id.*, at —, n. 2.

to be served by the limitations on partisan political activities now contained in the Hatch Act.

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees not, for example, take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government. See 84 Cong. Rec. 9598; 86 Cong. Rec. 2433–2434, 2864; Hearings on S. 3374 and S. 3417 Before the Committee on Post Office and Civil Service, 92d Cong., 2d Sess., 171.

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible and perhaps corrupt political machine. The experience of 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power—or the party out of power, for that

matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns. *E. g.*, 84 Cong. Rec. 9595, 9598, 9604, 9610.

A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. *E. g.*, *id.*, at 9598, 9603; 86 Cong. Rec. 2433–2434; Hearings on S. 3374 and S. 3417, *supra*, at 171. It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to his job and his political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another.[13] For example, at the hearings in 1972 on proposed legislation for liberalizing the prohibition against political activity, the Chairman of the Civil Service Commission stated that "the pro-

[13] In the 1940 debate over amendments to the Hatch Act, it was frequently stated that the only objectionable provisions were those restrictions in § 9 and the proposed § 12 against voluntary political activity, *e. g.*, 86 Cong. Rec. 2626, 2696, 2700, 2708, 2722. In response to the inquiry whether he was condemning those "who without any coercion, voluntarily desire to take a part in politics," Senator Hatch replied that he "would draw the line if it could be drawn; but I defy . . . [anyone] to draw that line." *Id.*, at 2626. During the 1967 hearings before the Commission on Political Activity the then Chairman of the Civil Service Commission noted that "one man's coercion is another man's persuasion," and that "in an employer employee relationship, the extent of voluntaryism tends to be rather substantially circumscribed." 3 Report of Commission on Political Activity of Governmental Personnel, Hearings, 759 (1968).

hibitions against active participation in partisan political management and partisan political campaigns constitute the most significant safeguards against coercion . . . ." Hearings on S. 3374 and S. 3417, *supra*, at 52. Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

Neither the right to associate nor the right to participate in political activities is absolute in any event. See, *e. g.*, *Rosario* v. *Rockefeller*, — U. S. — (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972); *Bullock* v. *Carter*, 405 U. S. 134, 140–141 (1972); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); *Williams* v. *Rhodes*, 393 U. S. 23, 30–31 (1968). Nor are the management, financing and conduct of political campaigns wholly free from governmental regulation.[13] We agree with the basic holding of *Mitchell* that plainly identifiable acts of political management and political campaigning may constitutionally be prohibited on the part of federal employees. Until now this has been the judgment of the lower federal courts,[14] and we do not understand the District Court in this case to have questioned the constitutionality of a law that was specifically limited to

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[13] *E. g.*, 18 U. S. C. § 594 (intimidation of voters); *id.*, § 597 (expenditures to influence voting); *id.*, § 602 (solicitation of political contributions); and *id.*, § 612 (publication or distribution of political statements).

[14] See, *e. g.*, *Northern Virginia Regional Park Authority* v. *U. S. Civil Service Commission*, 437 F. 2d 1346 (CA4 1971), cert. denied, 403 U. S. 936 (1971); *Fishkin* v. *U. S. Civil Service Commission*, 309 F. Supp. 40 (ND Cal. 1969), appeal dismissed as untimely, 396 U. S. 278 (1970); *Kearney* v. *Macy*, 409 F. 2d 847 (CA9 1969), cert. denied, 397 U. S. 943 (1970); *Engelhardt* v. *U. S. Civil Service Commission*, 197 F. Supp. 806 (MD Ala. 1961), aff'd *per curiam*, 304 F. 2d 882 (CA5 1962).

prohibiting the conduct in which Mr. Poole in the *Mitchell* case admittedly engaged.

III

But however constitutional the proscription of identifiable partisan conduct in understandable language may be, the District Court's judgment was that § 7324 (a)(2) was both unconstitutionally vague and fatally overbroad. Appellees make the same contentions here, but we cannot agree that the section is unconstitutional on its face for either reason.

As an initial matter, we must have clearly in mind the statutory prohibitions that we are examining for impermissible vagueness and overbreadth.

Section 7324 (a)(2) provides that an employee in an executive agency must not take "an active part in political management or in political campaigns" and goes on to say that this prohibition refers to "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." Section 7324 (b) privileges an employee to vote as he chooses and to express his opinion on political subjects and candidates, and § 7324 (c) and (d), as well as § 7326, also limit the applicability of the section.[15]

[15] 5 U. S. C. § 7324 provides:

"(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

"(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

"(2) take an active part in political management or in political campaigns.

"For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before

The principal issue with respect to this statutory scheme is what Congress intended when it purported to define "an active part in political management or in political campaigns," as meaning the prior interpretations by the

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July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

"(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

"(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

"(d) Subsection (a)(2) of this section does not apply to—

"(1) an employee paid from the appropriation for the office of the President;

"(2) the head or the assistant head of an Executive department or military department;

"(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

"(4) the Commissioners of the District of Columbia; or

"(5) the Recorder of Deeds of the District of Columbia."

5 U. S. C. § 7326 states:

"Section 7324 (a)(2) of this title does not prohibit political activity in connection with—

"(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

"(2) a question which is not specifically identified with a National or State political party or political party or a territory or possession of the United States.

"For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States."

Civil Service Commission under Civil Service Rule I which contained the identical prohibition.

Earlier in this opinion it was noted that this definition was contained in § 15 of the 1940 Act. As recommended by the Senate Committee, S. Rep. No. 1236, 76th Cong., 3d Sess., 2, 4, § 15 conferred broad rule-making authority on the Civil Service Commission to spell out the meaning of "an active part in political management and political campaigns." [16] There were, in any event, strong objections to extending the Hatch Act to those state employees working in federally financed programs, *e. g.*, 86 Cong. Rec. 2486, 2793–2794, 2801–2802, and to § 15, in particular, as being an unwise and invalid delegation of legislative power to the Commission. *E. g., id.*, at 2352, 2426–2427, 2579, 2794, 2875. The matter was vigorously debated; and ultimately Senator Hatch, the principal proponent and manager of the bill, offered a substitute for § 15, *id.*, at 2928 and 2937, limiting the reach of the prohibition to those same activities that the Commission "has heretofore determined are at the time of the passage of this Act prohibited on the part of employees" in the classified service by the similar provision in Civil Service Rule I.[17] The matter was further debated, and the amendment carried. *Id.*, at 2958–2959.

[16] Section 15, as reported out of the Senate Committee, provided:

"SEC. 15. The United States Civil Service Commission is hereby authorized and directed to promulgate, as soon as practicable, rules or regulations defining, for the purposes of this act, the term 'active part in political management or in political campaigns.' After the promulgation of such rules or regulations, the term 'active part in political management or in political campaigns,' as used in this act, shall have the meaning ascribed to it by such rules or regulations. The Commission is authorized to amend such rules or regulations from time to time as it deems necessary." 86 Cong. Rec. 2352.

[17] The substitute for the section recommended by the Committee provided:

"SEC. 15. The provisions of this act which prohibit persons to

The District Court and appellees construe § 15, now part of § 7324 (a)(2), as incorporating each of the several thousand adjudications of the Civil Service Commission under Civil Service Rule I, many of which are said to be undiscoverable, inconsistent, or incapable of yielding any meaningful rules to govern present or future conduct. In any event, the District Court held the prohibition against taking an active part in political management and political campaigns to be itself an insufficient guide to employee behavior and thought the definitional addendum of § 15 only added additional confusion by referring the concerned employees to an impenetrable jungle of Commission proceedings, orders, and rulings. 346 F. Supp. 582–583, 585.

We take quite a different view of the statute. As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. With this in mind and having examined with some care the proceedings surrounding the passage of the 1940 Act and adoption of the substitute for § 15, we think it appears plainly enough that Congress intended to deprive the Civil Service Commission of rule-making power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of con-

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whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined *are at the time of the passage of this act* prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." 86 Cong. Rec. 2937 (emphasis added).

After the substitute was introduced, *id.*, at 2928, Senator Hatch made a "slight modification," *id.*, at 2937, and added the phrase in italics above.

duct that would violate the prohibition against taking an active part in political management or political campaigns. But it is equally plain, we think, that Congress accepted the fact that the Commission had been performing its investigative and adjudicative role under Civil Service Rule I since 1907 and that the Commission had, on a case-by-case basis, fleshed out the meaning of Rule I and so developed a body of law with respect to what partisan conduct by federal employees was forbidden by the rule. 86 Cong. Rec. 2342, 2353. It is also apparent, in our view, that the rules that had evolved over the years from repeated adjudications were subject to sufficiently clear and summary statement for the guidance of the classified service. Many times during the debate on the floor of the Senate, Senator Hatch and others referred to a summary list of such prohibitions, *e. g.*, *id.*, at 2929, 2937–2938, 2942–2943, 2949, 2952–2953, the Senator's ultimate reference being to Civil Service Form No. 1236 of September 1939, the pertinent portion of which he placed in the Record, *id.*, at 2938–2940,[18] and which was the Commission's then current effort to restate the prevailing prohibitions of Civil

[18] See Appendix, *infra*. Senator Hatch did not have Form 1236 with him on the floor during debate on § 15 and provided the pertinent portion from the Form for insertion into the Congressional Record after debate had been completed on the section. 86 Cong. Rec. 2938, 2940. However, the Senator had provided the Senate with a card listing 18 rules which were described as the Civil Service Commission's construction of Civil Service Rule I, *id.*, at 2937–2938, 2943. The card, prepared by Senator Hatch with assistance from the Commission, was a summary of pertinent portions of Form 1236, *id.*, at 2937–2938, and was inserted into the Congressional Record, *id.*, at 2943. It provided:

"The pertinent language in section 9 is practically a duplication of the civil-service rule prohibiting activity of employees under the classified civil service.

"The section provides in substance, among other things, that no

Service Rule I, as spelled out in its adjudications to that date. It was this administrative restatement of Civil Service Rule I law, modified to the extent necessary to reflect the provisions of the 1939 and 1940 Acts themselves, that, in our view, Congress intended to serve as its definition of the general proscription against partisan

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such officer or employee shall take any active part in political management or in political campaigns.

"The same language of the civil-service rule has been construed as follows:

"1. Rule prohibits participation not only in national politics but also in State, county, and municipal politics.

"2. Temporary employees, substitutes, and persons on furlough or leave of absence with or without pay are subject to the regulation.

"3. Whatever an official or employee may not do directly he may not do indirectly or through another.

"4. Candidacy for or service as delegate, alternate, or proxy in any political convention is prohibited.

"5. Service for or on any political committee is prohibited.

"6. Organizing or conducting political rallies or meetings or taking any part therein except as a spectator is prohibited.

"7. Employees may express their opinions on all subjects, but they may not make political speeches.

"8. Employees may vote as they please, but they must not solicit votes; mark ballots for others; help to get out votes; act as checkers, marker, or challenger for any party or engage in other activity at the poles except the casting of his own ballot.

"9. An employee may not serve as election official unless his failure or refusal so to do would be a violation of State laws.

"10. It is political activity for an employee to publish or be connected editorially, managerially, or financially with any political newspaper. An employee may not write for publication or publish any letter or article signed or unsigned in favor of or against any political party, candidate, or faction.

"11. Betting or wagering upon the results of a primary or general election is political activity.

"12. Organization or leadership of political parades is prohibited but marching in such parades is not prohibited.

"13. Among other forms of political activity which are prohibited are distribution of campaign literature, assuming political leader-

activities.[19] It was within the limits of these rules that the Civil Service Commission was to proceed to perform its role under the statute.

Not only did Congress expect the Commission to continue its accustomed role with respect to federal employees, but also in § 12 (b) of the 1940 Act Congress expressly assigned the Commission the enforcement task with respect to state employees now covered by the Act. The Commission was to issue notice, hold hearings, adjudicate and enforce. This process, inevitably and pre-

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ship, and becoming prominently identified with political movements, parties, or factions or with the success or failure of supporting any candidate for public office.

"14. Candidacy for nomination or for the election to any National, State, county, or municipal office is within the prohibition.

"15. Attending conventions as spectators is permitted.

"16. An employee may attend a mass convention or caucus and cast his vote, but he may not pass this point.

"17. Membership in a political club is permitted, but employees may not be officers of the club nor act as such.

"18. Voluntary contributions to campaign committees and organizations are permitted. An employee may not solicit, collect, or receive contributions. Contributions by persons receiving remuneration from funds appropriated for relief purposes are not permitted.

[19] That § 15's incorporation of the Civil Service Commission restatement was intended to include only those Commission interpretations consistent with the Hatch Act is demonstrated by the following colloquy between Senators Hatch and Minton, 86 Cong. Rec. 2871:

"Mr. MINTON. The right to express political opinions has been defined by the Civil Service Commission to mean the private expression of such opinions.

"Mr. HATCH: Yes; the word 'privately' is in the rule of the Civil Service Commission. It is not in . . . [§ 9 of the Hatch Act].

"Mr. MINTON. The Civil Service Commission has defined the right to express political opinions as the right to do so privately.

"Mr. HATCH. Mr. President, that is because the word 'privately' is included in the rule of the Civil Service Commission. The word 'privately' is written into the rule. That is the word which I dropped out. I did it deliberately, intentionally, and I want it to remain out."

dictably, would entail further development of the law within the bounds of, and necessarily no more severe than, the 1940 rules and would be productive of a more refined definition of what conduct would or would not violate the statutory prohibition of taking an active part in political management and political campaigns.

It is thus not surprising that there were later editions of Form 1236,[20] or that in 1970 the Commission again purported to restate the law of forbidden political activity and, informed by years of intervening adjudications, again sought to define those acts which are forbidden and those which are permitted by the Hatch Act. These regulations, 5 CFR Part 733, are wholly legitimate descendants of the 1940 restatement adopted by Congress and were arrived at by a process that Congress necessarily anticipated would occur down through the years. We accept them as the current and, in most respects, the long-standing interpretations of the statute by the agency charged with its interpretation and enforcement. It is to these regulations purporting to construe § 7234 as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 162–163 (1971); cf. *Gooding* v. *Wilson*, 405 U. S. 518, 520–521 (1972).

Whatever might be the difficulty with a provision against "taking active part in political management or in political campaigns," the Act specifically provides that the employee retains the right to vote as he chooses

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[20] 1942, 1944, and 1966, the title being changed in the 1966 edition to Political Activity.

and to express his opinion on political subjects and candidates. The Act exempts research and educational activities supported by the District of Columbia or by religious, philanthropic or cultural organizations, 5 U. S. C. § 7324 (c); and § 7326 exempts nonpartisan political activity: questions, that is, that are not identified with national or state political parties are not covered by the Act, including issues with respect to constitutional amendments, referendums, approval of municipal ordinances and the like. Moreover, the plain import of the 1940 amendment to the Hatch Act is that the proscription against taking an active part in the proscribed activities is not open-ended but is limited to those rules and proscriptions that had been developed under Civil Service Rule I up to the date of the passage of the 1940 Act. Those rules, as refined by further adjudications within the outer limits of the 1940 rules, were restated by the Commission in 1970 in the form of regulations specifying the conduct that would be prohibited or permitted by § 7324 and its companion sections.

We have set out these regulations in the margin.[21] We

[21] The pertinent regulations, appearing in 5 CFR Part 733, provide:

"PERMISSIBLE ACTIVITIES

"§ 733.111 Permissible activities.

"(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subject. Each employee retains the right to—

"(1) Register and vote in any election;

"(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

"(3) Display a political picture, sticker, badge, or button;

"(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

"(5) Be a member of a political party or other political organiza-

see nothing impermissibly vague in 5 CFR § 733.122, which specifies in separate paragraphs the various activities deemed to be prohibited by § 7324 (a)(2). There

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tion and participate in its activities to the extent consistent with law;

"(6) Attend a political convention, rally, fund-raising function; or other political gathering;

"(7) Sign a political petition as an individual;

"(8) Make a financial contribution to a political party or organization;

"(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

"(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

"(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

"(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

"(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

"(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

"PROHIBITED ACTIVITIES

"§ 733.121 Use of official authority; prohibition.

"An employee may not use his official authority or influence for the purpose of interfering with or affecting the result of an election.

"§ 733.122 Political management and political campaigning; prohibitions.

"(a) An employee may not take an active part in political man-

might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that al-

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agement or in a political campaign, except as permitted by this subpart.

"(b) Activties prohibited by paragraph (a) of this section include but are not limited to—

"(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

"(2) Organizing or reorganizing a political party organization or political club;

"(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

"(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

"(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

"(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

"(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

"(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

"(9) Driving voters to the polls on behalf of a political party or partisan candidate;

"(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

"(11) Serving as a delegate, alternate, or proxy to a political party convention;

"(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

"(13) Initiating or circulating a partisan nominating petition."

though the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." *United States* v. *Harriss*, 347 U. S. 612, 618 (1954). Surely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act.

The Act permits the individual employee to "express his opinion on political subjects and candidates," 5 U. S. C. § 7324 (b); and the corresponding regulation, 5 CFR § 733.111 (a)(2), privileges the employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." The section of the regulations which purports to state the partisan acts that are proscribed, *id.*, § 733.122, forbids in subparagraph (a)(10) the endorsement of "a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature or similar material," and in subparagraph (a)(12), prohibits "[a]ddressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office." Arguably, there are problems in meshing § 733.111 (a)(2) with §§ 733.122 (a)(10) and (12), but we think the latter prohibitions sufficiently clearly carve out the prohibited political conduct from the expressive activity permitted by the prior section to survive any attack on the grounds of vagueness or in the name of any of those policies that doctrine may be deemed to further.

It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.[22]

Neither do we discern anything fatally overbroad about the statute when it is considered in connection with the Commission's construction of its terms represented by the 1970 regulations we now have before us. The major difficulties in this respect again relate to the prohibition in § 733.122 (a)(10) and (12) on endorsements in advertisements, broadcasts, and literature and on speaking at political party meetings in support of partisan candidates for public or party office. But these restrictions are clearly stated, they are political acts normally performed only in the context of partisan campaigns by one taking an active role in them, and they are sustainable for the same reasons that the other acts of political campaigning are constitutionally proscribable. They do not, therefore, render the remainder of the statute vulnerable by reason of overbreadth.

Even if the provisions forbidding partisan campaign endorsements and speech making were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute as the District Court did. The remainder of the statute, as we have said, covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees, and the extent to which pure expression is impermissibly threatened, if at all, by § 733.122 (a)

[22] According to an affidavit filed in District Court by the General Counsel for the Civil Service Commission, App. 54:

"The Information Unit [in the Office of General Counsel] answers inquiries, from whatever source, concerning the application of the Hatch Act, Rule and regulations."

(10) and (12), does not in our view make the statute substantially overbroad and so invalid on its face. *Broadrick* v. *Oklahoma, post,* p. —.

For the foregoing reasons, the judgment of the District Court is reversed.

So ordered.

APPENDIX TO THE OPINION OF THE COURT

That portion of the United States Civil Service Commision Form 1236, Political Activity and Assessments, September 1939, as inserted into the Congressional Record by Senator Hatch, 86 Cong. Rec. 2938–2940, provided:

III. PARTICULAR TYPES OF PROHIBITED ACTIVITIES

11. As has been pointed out, it is impossible to make a complete enumeration of all the particular types of political activities in which Government employees may not engage. The general scope of the political-activity rule has been defined in section 2 above. In the following sections some of the types of political activity which occur more frequently are discussed in detail.

12. *Activity by indirection.*—Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including wives or husbands, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her behalf. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what their husbands may not secure for themselves. In such situations, it is obvious that the prohibitions against political activity are being indirectly violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

13. *Conventions.*—Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference. (See secs. 4 and 19.)

14. *Primaries—caucuses.*—An employee may attend a primary meeting, mass convention, beat convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in its deliberations. He may not act as an officer of the meeting, convention, or caucus, may not address it, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

15. *Committees.*—Service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a politi-

cal committee to which the general public is admitted, but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics, but which, when considered as a part of the whole purpose, assume an active political character. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

16. *Clubs and organizations.*—Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club, or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances. (See secs. 4 and 19.)

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in

said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Section 9A of the act of August 2, 1939 (Public, No. 252, 76th Cong.), provides as follows:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

17. *Contributions.*—An employee may make political contributions to any committee, organization, or person not employed by the United States, but may not solicit, collect, receive, or otherwise handle or disburse the contributions. (See provisions of the Criminal Code, discussed in secs. 36 to 50.)

18. *Meetings.*—Service in preparing for, organizing, or conducting a political meeting or rally, addressing such a meeting, or taking any part therein, except as a spectator, is prohibited.

19. *Expression of opinions.*—Although section 9 (a) of the act of August 2, 1939, reserves to Federal officers and employees the right to express their opinions on all political subjects, officers and employees in the competitive classified service are subject also to section 1 of civil-service rule I, under which such employees must confine

themselves to a *private* expression of opinion. Nonclassified and excepted employees may not indulge in such public expression of opinion as constitutes taking part in an organized political campaign. (See foregoing secs. 1 and 4.)

20. *Activity at the polls and for candidates.*—An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a national character. It is also a criminal offense to promise any employment, position, work or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party. (See secs. 48 and 50 herein.)

It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, assisting in counting the vote, or engaging in any other activity at the polls except the marking and depositing of his own ballot. Rendering service, such as transporting voters to and

from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of political activities prohibited by the rule, even if such service is performed without regard to political party.

21. *Election officers.*—Service as judge of election, inspector, checker, teller, or as election officer of any kind is prohibited.

22. *Newspapers—publication of letters or articles.*—A classified employee may not publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use. (See secs. 4 and 19.)

23. *Liquor question.*—Activity in campaigns concerning the regulation or suppression of the liquor traffic is prohibited. An employee may be a member but not an officer of a club, league, or other organization which takes part in such a campaign. The dissemination of temperance propaganda is permissible, but any endeavor for or against the regulation, control, or suppression of the liquor traffic through political agencies is prohibited.

24. *Betting or wagering on elections.*—Betting or wagering upon the results of primary and general elections is penalized by the laws of most States and is improper political activity.

25. *Activity in civic organizations and citizens' associations.*—Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, or civil-service rule I, provided such activities have no connection with the campaigns of particular candidates or parties.

26. *Parades.*—An employee may not march in a politi-

cal parade, organize, or be an officer or leader of such a parade.

A Government employee may not take part in the activities of a musical organization in any parade or other activity of a political party.

27. *Signing petitions.*—The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or Member thereof, shall not be denied or interfered with."

The right guaranteed by the Constitution and the statute extends only to petitions addressed to the Government, or to Congress or Members thereof. It does not extend to petitions addressed to State, county, or municipal governments, or to other political units. A classified employee is permitted to sign petitions of the latter class *as an individual*, without reference to his connection with the Government, but he may not initiate them, circulate them, or canvass for the signatures of others.

28. *Applying for Presidential positions not in the classified service.*[23]—When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service there is no objection

[23] Appointment is made by the President by and with the advice and consent of the Senate to postmaster positions of the first, second, and third classes, but these positions are in the competitive classified service under the act of June 25, 1938.

to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters, and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend another person for such an appointment; but he may not circulate a petition or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

When an unofficial primary or election is held for the purpose of determining the popular choice for the Presidential office, a classified employee may permit his name to appear upon the ticket, but he may not solicit votes in his behalf at such a primary or election, or in any manner violate section 1 of rule I. He may vote and express privately his opinions, but may not solicit votes or publicly advocate the candidacy or election of himself or any other person. Although it is permissible for a classified employee, *as an individual*, to sign a petition or recommend another person for appointment to a nonclassified position, he is not permitted to sign such a petition as a Government employee or in any other way to use his official authority or influence to advance the candidacy of any person for election or appointment to any office. Classified employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for any office, but they may

not do so as Government employees or as a group or association of Government employees.

29. *Other forms of political activity.*—Among other forms of political activity which are prohibited are the distribution of campaign literature, badges or buttons, and assuming general political leadership or becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office.

IV. CANDIDACY FOR OR HOLDING LOCAL OFFICE—CLASSIFIED AND NON-CLASSIFIED EMPLOYEES

30. *Candidacy for local office.*—Candidacy for a nomination for election to any national, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy. The fact that candidacy is merely passive is immaterial; if an employee acquiesces in the efforts of friends in furtherance of such candidacy such acquiescence constitutes an infraction of the prohibitions against political activity.

31. *Federal employees holding local office.*[24]—Persons holding Federal civil office by appointment, whether in the competitive classified service or not, are prohibited from accepting or holding any office under a State, Territorial, or municipal government by an Executive order of January 17, 1873, which is as follows:

Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under

[24] See sec. 35.

the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such Federal officer of his commission or appointmnt in the service of the United States.

The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of

deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also excepted from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters.[25] Heads of departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively.[26]

32. *Interpretation of the order of January 17, 1873.*— An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested

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[25] See sec. 8.

[26] A Federal employee who resigns at the expiration of his accrued leave may accept a State or municipal position after his last day of active Federal service (16 Comp. Gen. 776, Feb. 19, 1937).

that there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges [37] are not regarded as "offices" within the contemplation of the Executive order, but as employments or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus,

[37] Includes assistant professorships in a State college, assistant ectureships in an evening school of a municipal university, instructor-ips in a State college, and similar positions in State and municipal lleges and universities (minute of Commission, August 7, 1937).

in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government or from any department, whether for a fixed time or at the pleasure of the appointing power, are embraced within the operation of the order.

33. *Eligibles holding local office.*—Eligibles who are holding a local office not excepted from the prohibitions of the order of January 17, 1873, on selection for and acceptance of any position in the competitive classified service or of unclassified laborer must immediately resign the local office. Such resignation must be effected whether the service in the local office is compensated or uncompensated or whether the employee is on active duty or leave without pay. The holding of a local office not excepted from the prohibitions of the order of January 17, 1873, is an absolute disqualification for appointment, and unless persons otherwise eligible for appointment are willing immediately to resign the local office in the event

of selection for appointment, their appointments cannot be approved.

34. *Minor local offices which may be held by Government officers and employees.*—Although the Executive orders of January 17 and January 28, 1873, prohibit generally any person holding Federal civil office by appointment, from accepting or holding an office under a State, Territorial, or municipal government, certain offices of a minor character are excepted from this general prohibition. Among these are positions of justice of the peace; notary public; commissioner to take acknowledgement of deeds, of bail, or to administer oaths; positions on boards of education, school committees, public libraries, and in religious or eleemosynary institutions. In addition, Federal employees are, under certain conditions, permitted to hold other local offices under authority of the Executive orders set forth in section 35. The permision to hold local offices granted by these Executive orders, however, is now subject to the general prohibition of section 9 of the act of August 2, 1939 (see sec. 1), against participation in political management and in political campaigns by Federal employees.

In view of the broad language of section 9 of the act of August 2, 1939, the incumbency by a Federal employee of any *elective* office whatever under a State, Territorial, or municipal government is prohibited, regardless of whether or not the office is of such character that its incumbency was permitted by Executive order prior to the enactment of the act. The incumbency by a Federal employee of an appointive office under a State, Territorial, or municipal government is permissible, provided such incumbency is specifically authorized by some statute or Executive order. In securing such offices, however, and in the discharge of the duties thereof, Federal employees must not engage in political management.

SUPREME COURT OF THE UNITED STATES

No. 72–634

United States Civil Service Commission et al., Appellants, *v.* National Association of Letter Carriers, AFL–CIO, et al.	On Appeal from the United States District Court for the District of Columbia.

[June 25, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The Hatch Act by § 9 (a) prohibits federal employees from taking "an active part in political management or in political campaigns." Some of the employees, whose union is speaking for them, want

"to run in state and local elections for the school board, for city council, for mayor

"to write letters on political subjects to newspapers

"to be a delegate in a political convention

"to run for an office and hold office in a political party or political club

"to campaign for candidates for political office

"to work at polling places in behalf of a political party."

There is no definition of what "an active part . . . in political campaigns" means. The Act incorporates over 3,000 rulings of the Civil Service Commission between 1886 and 1940 and many hundreds of rulings since 1940. But even with that gloss on the Act, the critical phrases lack precision. In 1971 the Commission published a three-volume work entitled Political Activities Reporter

which contain over 800 of its decisions since the enactment of the Hatch Act. One can learn from studying those volumes that it is not "political activity" to march in a band during a political parade nor to wear political badges and to "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency as an employee or the neutrality, efficiency or integrity of his agency."

That is to say some things, like marching in a band, are clear. Others are pregnant with ambiguity as "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise," etc. Permission to "take an active part . . . in a nonpartisan election" also raises large questions of uncertainty because one may be partisan for a person, an issue, a candidate without feeling an identification with one political party or the other.

The District Court felt that the prohibitions in the Act are "worded in generalities that lack precision," 346 F. Supp., at 582, with the result that it is hazardous for an employee "if he ventures to speak on a political matter, since he will not know when his words or acts relating to political subjects will offend." *Id.*, at 583.

The chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration. That effect would not be material to the issue of constitutionality if only the normal contours of the police power were involved. On the run of social and economic matters the "rational basis" standard which *United Public Workers* v. *Mitchell*, 330 U. S. 75, applied would suffice.[1] But what may have been unclear to some in *Mitchell*

[1] "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere wth the efficiency of the public service." *United Public Workers* v. *Mitchell*, *supra*, at 101.

should by now be abundantly clear to all. We deal here with a First Amendment right to speak, to propose, to publish, to petition Government, to assemble. Time and place are obvious limitations. Thus no one could object if employees were barred from using office time to engage in outside activities whether political or otherwise. But it is of no concern of Government what an employee does in his or her spare time, whether religion, recreation, social work, or politics is his hobby—unless what he or she does impairs efficiency or other facets of the merits of his job. Some things, some activities do affect or may be thought to affect the employee's job performance. But his political creed, like his religion, is irrelevant. In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall. If Government employment were only a "privilege," then all sorts of conditions might be attached. But it is now settled that Government employment may not be denied or penalized "on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." See *Perry* v. *Sanderman*, 408 U. S. 593, 597. If Government, as the majority stated in *Mitchell*, may not condition public employment on the basis that the employee will not "take any active part in missionary work," 330 U. S., at 100, it is difficult to see why it may condition employment on the basis that the employee not take "an active part . . . in political campaigns." For speech, assembly, and petition are as deeply embedded in the First Amendment as proselytizing a religious cause.

Free discussion of governmental affairs is basic in our constitutional system. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250; *Mills* v. *Alabama*, 384 U. S. 214, 218; *Mentor Patriot Co.* v. *Roy*, 401 U. S. 265, 272. Laws

that trench on that area must be narrowly and precisely drawn to deal with precise ends. Overbreadth in the area of the First Amendment has a peculiar evil, the evil of creating chilling effects which deter the exercise of those freedoms. *Dombroski* v. *Pfirter*, 380 U. S. 479, 486. As we stated in *NAACP* v. *Button*, 371 U. S. 415, 433, in speaking of First Amendment freedoms and the unconstitutionality of overbroad statutes, "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Mitchell is of a different vintage than the present cases. Since its date a host of decisions have illustrated the need for narrowly drawn statutes that touch First Amendment rights. A teacher was held to be unconstitutionally discharged for sending a letter to a newspaper that criticized the school authorities. *Pickering* v. *Board of Education*, 391 U. S. 353, 573, "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." We followed the same course in *Wood* v. *Georgia*, 370 U. S. 385, when we relieved a sheriff from a contempt conviction for making a public statement in connection with a current political controversy. As in the present cases, the sheriff spoke as a private citizen and what he said did not interfere with his duties as sheriff. *Id.*, at 393–394.

The present Act cannot be appropriately narrowed to meet the need for narrowly drawn language not embracing First Amendment speech or writing without substantial revision. That rewriting cannot be done by the Commission because Congress refused to delegate to it authority to regulate First Amendment rights. The pro

posal to do so aroused a great debate in Congress [2] and Senator Hatch finally submitted a substitute, saying "it does away with the question of delegation of power." [3]

The Commission on a case by case approach has listed 13 categories of prohibited activities, 5 CFR § 733.122 (b), starting with the catch-all "include but are not limited to." So the Commission ends up with open-end discretion to penalize X or not to penalize him. For example, a "permissible" activity is the employee's right to "express his opinion as an individual privately and publicly on political subjects or candidates." 5 CFR § 733.111 (a)(2). Yet "soliciting votes" is prohibited. 5 CFR § 733.122 (b)(7). Is an employee safe from punishment if he expresses his opinion that candidate X is the best and candidate Y the worst? Is that crossing the forbidden line of soliciting votes?

A nurse at a veterans' hospital put an ad in a newspaper reading:

> "To All My Many Friends of Poplar Bluff and Butler County I want to take this opportunity to ask your vote and support in the election, TUESDAY, AUGUST 7th. A very special person is seek-

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[2] S. 3046, as reported by the Senate Committee on Privileges and Elections, authorized "the Civil Service Commission to define the term 'active part in political management or in political campaigns' as that term is used in the prohibition applicable to Federal employees and in the prohibitions applicable to State and local officers and employees." S. Rep. No. 1236, 76th Cong., 3d Sess., 2. The Senate was reluctant to leave the task of defining these terms "to some bureaucratic board which has absolutely no knowledge of political conditions and circumstances in any section of the country." 86 Cong. Rec. 2427 (remarks of Senator Lucas). The section also was challenged as an unconstitutional delegation of legislative authority. *Id.*, at 2579 (remarks of Senators Brown and McKellar). Others were concerned with problems of fairness. *Id.*, at 2720 (Senator Bankhead).

[3] *Id.*, at 2928.

ing the Democratic nomination for Sheriff. I do not have to tell you of his qualifications, his past records stand.

"This person is my dad, Lester (Less) Massingham.

THANK YOU

WALLACE (WALLY) MASSINGHAM"

She was held to have violated the Act. *Massingham*, 1 PAR 792 (1959).

Is a letter a permissible "expression" of views or a prohibited "solicitation?" The Solicitor General says it is a "permissible" expression; but the Commission ruled otherwise. For an employee who does not have the Solicitor General as counsel great consequences flow from an innocent decision. She may lose her job. Therefore the most prudent thing is to do nothing. Thus is self-imposed censorship imposed on many nervous people who live on narrow economic margins.

I would strike this provision of the law down as unconstitutional so that a new start may be made on this old problem that confuses and restricts nearly 5 million federal, state, and local public employees today that live under the present Act.